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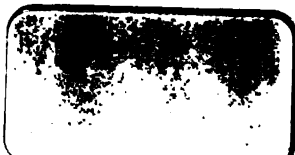
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A
GENERAL ABRIDGMENT
OF

Law and Equity,

ALPHABETICALLY DIGESTED UNDER
PROPER TITLES;

WITH NOTES AND REFERENCES
TO THE WHOLE.

BY CHARLES VINER, Esq.
FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY
OF OXFORD.

FAVENTE DEO.

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Bailiff.

(D) Pleadings.

1. **I**N trespass the defendant justified as bailiff of J. S. to distrain for rent arrear, and the plaintiff said, *that riens arrear*, and a good issue against the bailiff; *contra* against the lord himself; note the diversity. Br. Trespafs, pl. 206. cites 14 H. 6. 5.

Br. Traverse per, &c. pl. 147. cites S. C. and there the plaintiff replied, that he

is not bailiff; prift; and there see this held to be a good plea. — But *contra* if he says *that he as bailiff*, and by his command took the distress; for command suffices though he be not bailiff. Br. Traverse per &c. pl. 147. cites 14 H. 6. 5.

2. Bailiff shall have every challenge to the array and polls as his master shall have. Br. Baillie, pl. 29. cites 9 H. 7. 24. per tot. cur.

3. And may say, *that the tenements are in another vill*, but bailiff shall not disclaim in the land, *contra* of attorney, and bailiff may plead *misnomer of his master*, and the other pleas triable by the assise. Ibid.

4. If there are two coparceners of a rent, and the one distrains and avows for himself, and justifies as bailiff of his companion, it is not traversable that he is not bailiff. Br. Traverse per, &c. pl. 118. cites 15 H. 7. 17.

5. In assise, if J. S. appears as bailiff of the tenant, it is not traversable if he be bailiff or not. Br. Traverse per, &c. pl. 345. cites 15 H. 7. 17.

6. *Replevin*, the defendant made cognizance as bailiff to the E. of Bedford, *whereas in truth he was not his bailiff, but took the distress against his will*. It was held, that the plaintiff cannot traverse, that he was not his bailiff, for it is not issuable; nor can the earl disavow it, for he is not party; nor can the earl have an action upon the case, because he is not damnified; but the party whose cattle are taken, may bring an action of trespass for taking his cattle; and if the defendant justifies as bailiff, he may say, *de son tort demesne absque tali causa*, and so punish him. Cro. E. 14. pl. 3. Pasch. 25 Eliz. C. B. the Earl of Bedford's case.

S. C. cited by Trevor Ch. J. but denied by him in delivering the opinion of the court. 11 Mod. 112. pl. 8. Pasch. 6 Ann. C. B. in case of Trevillian v. Pine.

7. In trespass the defendant justified as bailiff to J. S. The plaintiff replied, that he took his cattle of his own wrong, and traversed his being bailiff. Anderson Ch. J. said, that if one has cause to distrain my goods, and a stranger of his own wrong takes my goods not as bailiff or servant to the other, and I bring tres-

Not his bailiff is not a good traverse in trespass; Arg. Roll. Rep. 46. pl. 13. in Lee's

case, cited 33 H. 6. 3. and the reporter says, that the reason given in that case is, because if the franktenement be in a stranger, the plaintiff has no colour to have

trespass, be the defendant bailiff or not; but there it is held, that in *avowry for rent* as bailiff to a stranger such traverse is good, because there was no trespass done if he was not his bailiff. And so the reporter says it is in the principal case of *Lee v. . . .* The taking the beasts of the plaintiff in the franktenement of a stranger is a tort to the plaintiff, unless he had good authority from the stranger to take them; for it may be, the stranger may bring trespass for the damage done by the beasts, and then which way can the plaintiff aid himself against the defendant, unless by this traverse; *ideo quære.*

[2] 8. In replevin the defendant made *conusance as bailiff to J. S. for damage feasant*; the plaintiff replied, that one A. did pretend right to the land where, &c. and that the defendant took them in right of the said A. absque hoc that he took them as bailiff to J. S. and upon demurrer all the justices held clearly, that the traverse is good. And as to a matter which was objected, that if this traverse should be allowed, the meaning of the defendant will be drawn in question, they said, that the same is not any mischief; for so it is in other cases, as in the case of recaption. 2 Le. 215; 216. pl. 274. Pasch. 29 Eliz. C. B. Fuller v. Trimwell.

ance observed between an action of *trespass quare clausum fregit*, and an action of *trespass for taking cattle or replevin*; in the first case, if the defendant justifies an entry to the close by command, or as bailiff to one in whom he alleges the freehold to be, the plaintiff shall not in his replication traverse the command; because it would admit the truth of the rest of the plea, viz. that the freehold was in J. S. and not in the plaintiff, which would be sufficient to bar his action, whether the defendant was empowered by J. S. to enter, or not empowered; for it is not material that the defendant has done a wrong to a stranger, if it be none to the plaintiff; but in the other two cases, if the defendant justifies taking my cattle as bailiff to J. S. in whom he lays a title to take them, as for distress or other cause, there it may be material to traverse the command or authority; for tho' J. S. had right to take the cattle, yet a stranger who had no authority from him will be liable; so that both parts of the defendant's plea in this case must be true, and therefore an answer to any part is sufficient; so in trespass for taking goods. — 11 Mod. 112. pl. 8. Pasch. 6 Ann. C. B. the S. C. adjudged accordingly, that in replevin or avowry the being bailiff is traversable; for otherwise a man might be twice charged; for suppose the lord brought trespass, and the tenant pleaded the recovery in the replevin, this shall not conclude the lord; for it would be very mischievous that the lord should be concluded, and not be able to say that he was not his bailiff, and had no authority express or implied. An agreement or consent subsequent will amount to an authority, &c. and the whole court agreed that it is traversable.

The bailiff without special warrant from the steward, cannot distrain for an amercement in a leet. Mo. 607. pl. 839.

9. In an *avowry* for an *amercement* in a court leet upon a vill, for not making a tumbrel and stocks, he must *alledge, that the pain is unpaid to the lord*, because if any other of the vill has paid the pain, the plaintiff is not distrainable; also he must plead *the precept of the steward* for taking the distress, or levying the pain, and *the extract of the court*, which the bailiff ought to have for his warrant. Mo. 574. pl. 789. Trin. 40 Eliz. Scroggs v. Stevenson.

Trin. 40 & 41 Eliz., in case of *Stevenson v. Scroggs*. — Cro. E. 698. pl. 11. Mich. 41 & 42 Eliz.

Bailment.

2

Mss. B. R. Steventon v. Scroggs, S. C. and Popham said, that the defendant as bailiff of the manor cannot distrain for an amerciamment by reason of his office, without an especial warrant from the Steward or lord, no more than a sheriff may levy amerciamments of this court without warrant; but Gawdy e contra; that he may restrain for lawful amerciamments, by reason of the office; but he cannot enter for a condition broken.

10. In replevin the defendant justified, for that the place where is the freehold of the dean of P. and that he as his bailiff took the cattle damage feasant; the plaintiff replied, *de injuria sua propria, absque hoc that he is his bailiff*. It was objected, that the plaintiff could not traverse that the defendant was bailiff, because he had confessed the franktenement in the dean, in whose right he justified. And judgment was given per cur. viz. Croke, Doderidge, and Haughton, that the plea [replication] is not good, and so against the plaintiff. Roll. Rep. 46. Trin. 12 Jac. B. R. Lee v.

S. C. cited Arg. Ld. Raym. Rep. 310. in case of Britton v. Cole.

11. In replevin, the defendant made consuance as bailiff of J. S. for a rent-charge; plaintiff pleaded in bar, that he took the distress without the privity or command of J. S. and that such a day after J. S. had first notice of it, and then disavowed the taking aforesaid. Defendant demurred generally; and per cur. the bar is ill; for he ought to have traversed the being bailiff, and was ruled to replead so, and to amend his bar, paying costs, and to go to trial whether bailiff or not. 3 Lev. 20. Pasch. 33 Car. 2. C. B. Dobson v. Douglas.

In replevin, the defendant made consuance as bailiff to B. for rent, &c. the plaintiff replies, and traverses, that the defendant was bailiff to B.

and issue thereupon, and after verdict a motion was made for a repleader, but denied * per cur. for that this is not traversable, and it had been ill upon demurrer, yet after verdict it is good, and is not such an immaterial issue as to cause the granting of a repleader. Ld. Raym. Rep. 405. Mich. 10 W. 3. Redding v. Lion.

A. avowed as a bailiff for rent, his being bailiff is not traversable; per Holt Ch. J. 12 Mod. 321. Mich. 11 W. 3. B. R. v. Goudier.

*[3]

For more of Bailiff in general, see Account, Master and Servant, Replevin, and other proper titles.

Bailment.

(A) Bailment. [In what Cases the Bailee is answerable.]

Fol. 338.

[1.] IF a man pawns goods to me for money, and I put them among my other goods, and all are stole before any tender of the money, I shall not answer to him for the goods, for I had a property in the goods for the time. 29 Aff. 28. adjudged.]

Br. Bailment, pl. 7. cites S. C. but S. P. does not appear. — Co.

Litt. 29. a. S. P. accordingly. — 4 Rep. 83. b. S. P. resolved in Southcote's case. — Br. Detinam de Bians, pl. 35. cites S. C. — If I bail goods to you, and you are robbed of them, this shall

shall excuse you, per Jenny; and per Danby Ch. J. if he receives them to keep as his own goods, then this is a good excuse, and otherwise not. Br. Detinue de Biens, pl. 27. cites 9 E. 4. 40. — If a man bails his goods to J. S. and a stranger takes them, trespass lies per Keble, and so he has remedy, and therefore shall be charged to the bailor. Br. Detinue de Biens, pl. 37. cites 6 H. 7. 12. — 2 Ld. Raym. Rep. 912. S. C. cited by Powel J. but calls it an obiter opinion. — Contra where a felon robs him of them; for there he has no remedy; note the diversity; but Fincux held that he shall have remedy against a felon. Quære, how. Br. Detinue de Biens, pl. 37. cites 6 H. 7. 12.

Issue was taken upon the tender. Br. Detinue de Biens, pl. 35. cites [2. But it had been otherwise, if the tender of the money was before the stealing, (for by the tender the property was re-vested in the mortgagor) and I but a bailee. 29 Aff. 28. adjudged.]

S. C. & S. P. — Br. Bailment, &c. pl. 7. cites S. C. but S. P. does not appear. — S. C. and same diversity cited by Doderidge J. Roll. Rep. 129. — Co. Litt. 89. a. same diversity taken accordingly. — S. P. resolved accordingly. 4 Rep. 83. b. Paich. 43 Eliz. B. R. in Southcote's case. — 2 Ld. Raym. Rep. 917. in case of Coggs v. Barnard, says, that the bailee's having a special property in the pawn is not the reason of the case, and there is another reason given for it in the Book of Assise, and which is indeed the true reason of all these cases, viz. that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for the restoring the goods; but indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because by detaining them after the tender he is a wrong doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And he that keeps goods by wrong, must be answerable for them at all events, because his detaining them is the reason of the loss.

Br. Bailment, pl. 7. cites S. C. accordingly. — In such case the [3. But a general bailee of goods shall answer for them, if they are lost with his own goods; for when he accepts them generally, it is with a warranty in law. Contra 29 Aff. 28. per Thorp.]

bailee is discharged, per Thorp. Br. Detinue de Biens, pl. 35. cites S. C. — As where * they are delivered to him to be safely kept, and after they are stolen, this will not excuse him, because by the acceptance he undertook to keep them safely, and therefore he must keep them at his peril. And so it is if goods are delivered to him to be kept; for to be kept, and to be safely kept, is all one in law. Co. Litt. 89. a. — S. P. adjudged, 4 Rep. 83. b. Paich. 43 Eliz. B. R. Southcote's case.

But if the goods are delivered to him, to be kept as he would keep his own, there if they are stolen from him without his default or negligence, he shall be discharged. Co. Litt. 89. a. — S. P. 4 Rep. 83. b. in Southcote's case — Cro. E. 815. pl. 4. Southcote v. Bennet, S. C. & S. P. held accordingly, by Gawdy and Clench, cæteris absentibus, and judgment for the plaintiff.

* [4]

4. If I lend you my horse, and he dies suddenly without your default, you are discharged, per Kirton. Br. Charge, pl. 2. cites 40 E. 3. 6.

2 Ld. Raym. Rep. 914. Holt Ch. J. cites this case, and says it was but a sudden opinion, and that but by half the court, and yet this is the only ground for the opinion of my Ld. Coke in [5. In detinue, goods were bailed at the jeopardy of the plaintiff, and the defendant shewed how W. had taken the goods. Per Rede, this is no plea, for the defendant might have action against the taker. Per Keble, the bailor shall have the action, for he has the property; and it was touched, that if goods are robbed from the bailee, he shall not be charged over, but if they are taken by a trespassor of whom he may have confidence, he shall be charged, for he has his remedy over. But per Brian, this is of a general bailment, but otherwise it is of a bailment at the peril of the bailor, for the bailee shall recover no damages, for he is not charged over to the bailor. Br. Bailment, pl. 8. cites 3 H. 7. 4.]

Southcote's case, which besides he has improved. But says that the practice has been always at Guildhall, to disallow that to be a sufficient evidence to charge the bailee, and that it was practised so

So all Ch. J. Pemberton's time and ever since, against the opinion of that case. And from several authors cited by Holt, he infers, *ibid.* 915. that a bailee is not chargeable without an apparent gross neglect; and if such there be, it is looked upon as an evidence of fraud; nay, suppose the bailee undertakes to keep them safely and securely, in express words, yet even that will not charge him with all sorts of neglect; for were such a promise put into writing, it would not even then charge him so far.

6. If on bailment of *goods for safe custody*, the goods for want of good custody are *lost or destroyed*, case or detinue lies, and bailee shall be charged by super se assumpsit; per Frowike Ch. J. Kelw. 77. b. Mich. 21 H. 7.

And robbery is no plea. But if it was to keep as his own goods: it

would be otherwise, Cro. E. 815. Southcot v. Bennet. — 8 E. 2. tit. Detinue 59. — S. P. accordingly Went. Off. Ex. 113. seems of the same opinion; because bailor, as well as the bailee may have action for damages against the trespassor.

7. If the bailee of certain plate will not deliver it, *detinue* lies; but if he changes it, a *trover & conversion* lies. Arg. Roll. Rep. 59, 60. cites 28 H. 8. D.

D. 22. b. pl. 137. Trin. 28 H. 8. is that for altering

the plate, either action upon the case, or action of detinue lie, and cites Tempore E. 4.

8. If A. leaves a chest locked with B. to be kept, and takes the key away with him, and acquainteth not B. what is in the chest, and the chest together with the goods of B. are stolen away; B. shall not be charged therewith, because A. did not trust B. with them as this case is; and that which hath been said before of stealing, is to be understood also of other like accidents, as shipwrecks by sea, fire by lightning, and other like inevitable accidents. And all these cases were resolved and adjudged in B. R. And by these diversities, are all the books concerning this point reconciled. Co. Litt. 89. a. b.

S. P. resolved accordingly, 4 Rep. 83. b. in Southcot's case, and cites it as adjudged, 8 E. 2. tit. Detinue 59. — S. C. cited by Holt Ch. J. 2 Ld.

Raym. Rep. 914. Trin. 2 Ann. in case of Coggs v. Barnard, and says that he cannot see the reason of this difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest, for the bailee has as little power over them when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and has as great a power to defend them in the one case as in the other.

9. A. delivers money to B. to dispatch his business in the exchange; B. does not do it, action of debt lies for it. Noy Arg. 72. cites it as the case of Dowse v. Cawley. [5]

10. If beasts are bailed to feed the land, and the bailee kills the beasts, a general action of trespass lies. 11 Rep. 82. Pasch. 13 Jac. in Lewis Bowles's case.

S. P. by Rhodes J. Le. 83. in pl. 103. — S. P. agreed

accordingly by the justices, Goldsb. 67. pl. 10. Mich. 29 & 30 Eliz. in case of Blois v. Halman. — If bailee destroys the thing delivered trespass lies, per Gawdy J. Cro. E. 784. pl. 22. Mich. 42 & 43 Eliz. — Litt. S. 71. & Co. Litt. 57. a. (k)

11. If I deliver 100l. to A. to buy cattle, and he bestows 50l. of it in cattle, and I bring an action of debt for all, I shall be barred in that action for the money bestowed and charges, &c. but for the rest I shall recover. Hob. 207. Trin. 15 Jac. in the case of Speak v. Richards.

The fact was; there being an execution against the plaintiff, he brings 90l.

12. If money is delivered to A. to keep generally without any consideration or reward for so doing, if A. is robbed, he is discharged, and the owner shall bear the loss. Ruled upon evidence per *Ld. Pemberton*. 2 Show. pl. 166. Mich. 33 Car. 2. B. R. the King v. the Sheriff of Hertford.

to the defendant, part of the condemnation money, which he refused to take, saying the plaintiff in the action would not accept it, and he had nothing to do with it, he must go to him; and the party said he would be in town next Friday, pray do you keep it till then, and I will come again to you when the plaintiff will be here, and accordingly went away; and before the Friday the defendant's chamber was robbed. And now held no action lies against him. 2 Show. 172, 173. pl. 166. Mch. 33 Car. 2. B. R. The King v. Viscount [Sheriff] of Hertford.

Holt Ch. J. said that Southcot's case as reported in 4 Rep. is not all law, but where there is a special undertaking. For if there be but a general bailment, and a general acceptance, and so the matter left to a construction of law thereupon how the

13. If a man has goods upon a *naked bailment*, he is not chargeable if they are lost, &c. neither is he chargeable for a common neglect, and therefore *SOUTHCOTE'S CASE* is not good law, which says that a man shall be charged in an action on a general bailment, and it has been the general practice for twenty years last past. If a man hath goods to keep, and they are stolen, although there be a neglect in him, as if he omits to shut the door, &c. he shall not be charged with them, if he keeps them with the same care as he does his own. So if a man makes bailment to another, and he makes an *express promise* to keep the things safely, yet he is *not chargeable without his wilful default*, for such promise shall not charge him further than he was chargeable before; it would not do if it was in writing, and for the same reason it shall not do, if it is by parol. Resolved per tot. cur. Comyns's Rep. 134, 135. pl. 90. Pasch. 2 Ann. B. R. in case of *Cogs v. Barnard*.

goods shall be kept, the law will make construction, that you should keep them as you do your own; but where there is a *special acceptance* to keep them safely, there, at your peril you are bound by your special acceptance to keep them safe though you have no reward, and that you are not compellable by law to take them; per Holt Ch. J. 12 Mod. 487. Pasch. 13 W. 3. in case of *Lane v. Sir Robert Cotton*.

In the case of *Cogs v. Bernard*, 2 *Ld. Raym.* 909, &c. the Judges delivering their opinions seriatim, found great fault with Southcot's case; Gould said it was a hard case indeed, and observes that in *Cro. E.* 815. it was adjudged by two judges only, viz. Gaudy and Clench, and *ibid.* 912. *Powel J.* that all the foundation of Southcot's case is that in *9 E. 4. 40. b.* there is such an opinion by Danby. The case in *3 H. 7. 4.* was of a special bailment, so that that case cannot go very far in the matter. *6 H. 7. 12.* there is such an opinion by the by. But there are cases there cited, which are stronger against it, as *10 H. 7. 26. 29 Aff. 28.* the case of a pawn. My lord Coke would distinguish that case of a pawn from a bailment, because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep. *8 E. 2. Fitzh. Detinue 59.* the case of goods bailed to a man, locked up in a chest and stolen; and for the reason of that case, sure it would be hard, that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or however it may be with them, half mankind never heard of it. So for these reasons, I think a general bailment is not, nor cannot be taken to be a special undertaking to keep the goods bailed safely against all events. But if a man does undertake specially to keep safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

[6]

2 *Ld. Raym.* Rep. 909 to 920. S.C. adjudged for the plaintiff.

14. Some hogsheds of brandy were bailed to carry and deliver them safely, but in the carriage one of the casks was flayed and several gallons of the brandy were lost. The bailee had no premium for what he undertook; notwithstanding which, in an action on the case against the bailee, judgment was given for the plaintiff.

If

Bailment.

6

If the defendant had only offered himself to carry, there he would not be chargeable, for it would only have been nudum pactum, but here it being *super se assumptum*, the word assumption imports an undertaking; and when a man undertakes to do a thing and misdoes it, an action lies against him for it, though nobody could have compelled him to do the thing. Comyns's Rep. 133. pl. 90. Pasch. 2 Ann. B. R. Coggs v. Barnard.

15. If A. bail goods to C. and after gives his whole right in them to B. B. can't maintain *detinue* for them against C. because the special property that C. acquires by the bailment, is not thereby transferred to B. Per Holt Ch. J. 6 Mod. 216. Trin. 3 Ann. B. R. Rich. v. Aldred.

(B) Bailee. Who; and his Power and Interest.

1. IF I bail goods to deliver on request, yet I may seize them without request. Arg. Godb. 403. cites 26 H. 6. Per Doderidge J. in such case
there needs precise request, because it is part of the contract, and the request in pleading ought to be alleged. But if I deliver goods to re-deliver, *without saying on request*, there needs not a precise request. Ibid.

2. By Manwood. If goods be delivered to A. to pay to B. A may sell them. 2 Le. 90. pl. 113. Mich. 29 Eliz. in the exchequer in Clark's case. 2 Le. 31. pl. 36. S. C. in totidem verbis.

3. A. lent B. an horse to ride from G. to N. at 4s. for two days; B. goes out of the road from G. to N. yet A. cannot take the horse from B. For, for those two days B. has a special property against all the world; and A.'s remedy for riding out of the road, is by *action on the case*, but not to seize the horse. Yelv. 172. Hill. 7 Jac. B. R. Lee v. Atkinson. Cro. J. 236. pl. 8. S. C. adjudged for the plaintiff in action of battery, for assaulting him, &c.

and endeavouring to take the horse from him.—Brownl. 217. S. C. adjudged for the plaintiff.

4. Snow, Mr. Warner's partner, a goldsmith, having lost 21 lottery-tickets, and a lottery-order for 50l. immediately upon the loss of them sends to the goldsmiths company, and gets a number of printed tickets of the loss, with the number and description of the several lottery-tickets and order, which the beadle and servants of the company, according to the usage in such cases, delivered at all the goldsmiths shops in London, and several coffee-houses in and about the royal-exchange, and at the exchequer, &c. and the next day he put advertisements in several public prints, Gazette, &c. Some few days after these tickets and order were lost, one Samuel Snow, a broker, but of bad credit and reputation in his business, brings these tickets and the order to the defendant's shop, being a goldsmith in Lombard-street, where the said Samuel Snow did usually take up money, upon pawning or leaving lottery-tickets, or other government securities as a pledge for the money so received; but the defendant did never give him credit for any sum of money, without having some pledge in his

M. S. Rep. Trin. 4 Geo. in Canc. Warner & al' v. Jenkins & al'.

Bailment.

hands for his security; and in this way of dealing, they had paid and re-paid 20,000*l.* in three months time. *The defendant Jenkins advances to Samuel upon the delivery of these tickets and order, a sum of money near to the value of them. A bill being brought by the plaintiffs for a satisfaction for these tickets and order, the defendant insists upon the property, they being *payable to bearer*, and that he is a fair purchaser, and denies express notice that they were lost by the plaintiff Snow, and says that he took the tickets and order without examining the number, and only cast up the sums and value of them, being left in his hands only as a pledge and by a broker, and that is the usual way of transacting between goldsmiths and brokers, where money is taken up upon such public securities, which are left with the goldsmith only as a pledge till the money is re-paid. Per Parker C. if a person will buy lottery-tickets, or any other public securities payable to bearer or indorsee, with *notice that they were lost or stolen, and that the vendor came to them without a fair consideration*; this will not vest a right or property in the buyer. In this case, though here is not proof of express notice to the buyer, yet the *printed notice left at his shop*, and the several *advertisements in the printed papers*, will amount to sufficient notice so as to avoid the purchase; and though there is no direct proof of fraud in the defendants, yet here is a very gross neglect in not examining the tickets and order, and since the plaintiff did every thing in his power to retrieve the tickets and order, and it was the defendant's fault and carelessness not to examine them before he bought them, and Samuel Snow being broke and run away, the defendant Jenkins ought to make satisfaction to the plaintiff, and decreed accordingly, but without costs.

MS. Rep.
Pasch. 8
Geo. in
Canc. Black
v. Nichols
& al'.

5. The plaintiff, living in the country, leaves with the defendant, his banker in town, some *lottery-tickets and lottery-orders*, for which the defendant gives him a note, promising to be accountable for them on demand. There was no letter of attorney, or any express authority given to the defendant about them. The defendant continues to receive the interest, and once received 50*l.* of the principal, which the plaintiff approved of; but whether this 50*l.* was by sale of any of them, or was paid in the course of discharge by the government, or whether the defendant had any particular authority concerning this 50*l.* did not appear. The defendants, without any express authority, subscribed these into the S. S. Company in the name of the plaintiff, and stock for them was made out in the books in the plaintiff's name also. The plaintiff brings his bill for an account and satisfaction, &c. For the plaintiff the arguments turned upon the defendant's being only a depository to receive the interest; that this was the only power that a banker is understood to have in such cases which are common; that in regard to the 50*l.* principal, he must be supposed to have had a particular order for that, as it appeared to be a particular transaction. As to the lottery-tickets, that he had admitted himself to be accountable for the loss that accrued upon them, by an offer he made to pay such loss or difference; that this was within the old rules of
a loss

a loss arising from the unauthorized act of a depository, and therefore, if it was a new case, it was only so on the defendant's side, and the consequences would be too extensive to make a precedent in his favour. For the defendant it was insisted, that he had the legal interest in these things as bearer, was the plaintiff's trustee, and therefore is fully indemnified by the S. S. act, which empowers all trustees to subscribe; that his being possessed of these things, implied a power to discharge or dispose of them. The law infers such a power from the leaving a bond in the hands of a scrivener, who was agent in the lending money: he may receive it, and on payment deliver up the bond, without any express authority. The case of *PARRY AND STOKES*, lately decreed, was much stronger: the defendant there gave a note to transfer 150l. bank annuities to the plaintiff on demand; but when the plaintiff demands them, he says he has subscribed them. There the only question was, whether they were indeed subscribed, being in the defendant's own name; but if they were subscribed, it was agreed the plaintiff would be bound by it. Here the subscription is in the name of the plaintiff. The last act designed to give validity, and cure all defects in the subscriptions. In this case the company don't want its assistance, in regard to them; the subscription is certainly valid, and therefore, if private persons are bound as to the company, the act has certainly concluded all questions between themselves; for the same subscription cannot be valid in regard to one, and void as to another. But if this case is not within any of the acts, if the defendant is not a trustee, but only an agent or factor, or any thing else; yet he is unattended with any of those circumstances which should induce a court of equity to charge him with the loss. He has been guilty of no fraud, and had good reason to justify his mistake. The legislature recommended these subscriptions; it was the opinion of most men that they would be advantageous. The court should take notice of the hurry people were then in. The defendant acted as well for the plaintiff as he did for himself; he could have no advantage from this subscription, because it was in the plaintiff's name. The plaintiff might have received benefit from it, since it is proved it bore a premium. There was therefore no reason to charge the defendant. Per master of the rolls, this case arises upon the construction of several acts of parliament; the S. S. act, and the two subscription acts, that were made to confirm and supply what was done upon it. He seemed to express some doubts concerning the equity of those acts, and enlarged much upon the construction of some parts of them out of this case; but he said, that every one that sits in this court should act according to law; that he sat there *jus dicere, non dare*. This was agreeable to the rule of judging *secundum discretionem boni viri*; for *vir bonus est quis? qui consulta patrum, qui leges juraque servat*: that this case is not at all accompanied with any imposition or fraud, or design of profit to the defendant. The two sorts of security deposited, should receive a distinct consideration; as to the lottery-tickets, the defendants

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defendants are plainly trustees; but I don't think in all cases, where a thing is payable to bearer, the bearer will have the legal property; as where a ticket is stolen. And yet in such case, if such ticket was subscribed, the company would have good right from the bearer. Here plainly the defendants were trustees by being bearers, because, by having the securities, they had a power to receive the principal, which also the owner must know. I think this is a stronger case than that of a scrivener; for if he is enabled to discharge the debt by only having the custody of the bond, without any legal property, a fortiori here, where the defendant is trusted with the legal property: but if the scrivener does deliver up the bond without payment of the money, that will not discharge even the debtor, but he will continue still liable for the debt. The defendant's offer shall not bind him; for he would always stick to *Ld. Cowper's* rule, that no offer should prejudice the person offering. As to the case *Mr. Lutwich* put of a person intrusted to deliver over a thing to another, he is in no sense a trustee, but a meer porter or carrier; he can receive nothing, and yet even this person would be a trustee in regard to the *S. S. company*, but not so as to be himself indemnified for a subscription; but he thought there was no case of a real trustee that was not within the act. 'Tis plain the legislature intended to take in all sort of trusts whatsoever. If a man was any ways intrusted, though not a formal trustee, he had a power to subscribe: even creditors are bound by the subscription of executors, which is the hardest case. And yet, though the defendants are trustees, if there had been any fraud, any advantage to themselves, I would charge them, tho' their subscriptions would be valid as to the company. The course of dealing in these cases is very well known; the hurry was very great, the defendants thought they were acting for the benefit of the plaintiff, and for a small time it was for his benefit; he might have sold [contracted for] them at a premium. The second point concerning the lottery-orders is not so clear to be a trust, nor do I think I need declare any opinion whether it was a trust or not; so far it resembles a trust, because the defendants plainly had a power over the principal and interest, and that by the delivery of the party himself. He has made use of that power, as to the principal, by receiving the 50*l.* The assignment of these orders is with a blank. The bearer has a power to fill up that blank. The defendants had a power to make themselves trustees, by filling it up to themselves, and then they would have been good trustees in the sense of the act. But tho' he had the power to make himself a trustee, he has not made himself one; but the form of a trustee seems not to be considered by the act, but whether the person was in any sense intrusted. Upon the late act, I will not say how it will be where the company have got possession of orders without the act of the proprietor, or any authority from him, express or implied, that is a question of right. But suppose here this subscription is a void subscription, and not within the proviso of the late act, can the plaintiff make the de-

defendants stand in the place of the S. S. company, and make that satisfaction which the company ought to make, without making the company parties? I think the defendant should not be charged. If he has done wrong, it is without any ingredient of fraud to bring it into this court, and therefore, as a tort, should be prosecuted at law. What can this court decree for a tort? Can they decree that the defendant shall pay to the plaintiff the interest of these annuities, till the government would have redeemed them? And should we decree the payment of a certain sum, this would be directly to decree damages for a tort, and such an invasion upon the common law, as I hope never to see in this court. If this act has authenticated this subscription as to the company, it has also as to the proprietor. Bill dismissed per Jekyll, master of the rolls.

6. *Securities were delivered by A. to B. in order that B. should advance a sum of money upon them the next day; but no money was then advanced.* The question was whether B. can keep these securities, so delivered to him for this particular purpose, in order to have a satisfaction for a precedent debt due to him from A. Per Ld. C. Macclesfield; B. ought not to retain these securities in satisfaction of a precedent debt due to him from A. since they were delivered to him for another purpose, viz. as a pledge or security for another sum of money, intended and proposed to be advanced and lent to him; and since B. did not advance the money according to the agreement, he ought to return the pledge upon demand; and since he has not complied with his part of the agreement, he shall not retain the securities which he got into his hands by such a pretence and artifice, to secure to himself a satisfaction for a precedent debt; and gave costs against the defendant.

MS. Rep.
Trin. 8
Geo. in
Canc. Fe-
theringh
& al' vs
Frost.

7. Plaintiff brought trover against defendant for a diamond ear-ring, and other jewels, to which defendant pleaded not guilty. Upon a special verdict the case was, that plaintiff being owner of the goods mentioned in the declaration on the 12th of January, 1729, lodged them, for safe custody only, in the hands of Seymour the goldsmith, inclosed in a paper and bag, and took the receipt following: "12th of Jan. Received of Sir John Hartop the jewels following, (mentioning them all) which are sealed up in a bag; which bag, sealed up, I promise to take care of for him." That afterwards Seymour broke open the seals, and carried the jewels to defendant's shop, which is an open shop in London, as a banker; that Seymour borrowed of defendant 300l. upon the pledge of the jewels, and gave his note for that sum. No authority is found from the plaintiff to sell them; but he demanded them of the defendant, who, not being paid his money, refused to deliver them. Seymour was in possession of these jewels till he pledged them as aforesaid, which was in the year 1736. Seymour afterwards became a bankrupt; (but that is not material to the present question.) The value of the jewels is found to be 750l. After several arguments the Ch. J. pronounced the resolution of the court. The general question upon this special verdict is, whether, by any facts found, the plaintiff is barred from having the goods delivered to him, or from

MS. Rep.
Easter 1743.
in B. R.
Hartop v.
Hoare.

from having satisfaction; and 1st, it is to be considered in what relation Seymour stands with respect to the plaintiff. 2dly, whether any thing that is found divests the property of these diamonds from the plaintiff. As to the first delivery to Seymour, it was nothing more than a naked bailment for the use of the bailor, lodged there for safe custody only. Holt Ch. J. calls it a depositing, *SOUTHCOTE'S CASE*, 4. Co. In some respect the bailee has a property to keep, for the use of the bailor only. That upon Seymour's breaking the seal, he was a trespassor to the plaintiff, and that trespass would lie against him; cites *Moor* 248. and *Salk.* 655. the opinion of Trevor Ch. J. The second consideration is, how far the plaintiff is affected by any thing done by Seymour; whether his property is divested by any thing that is found. Seymour had the possession originally by right, but by breaking the seal he became a trespassor, and from thence a possessor of the goods by wrong. It is objected, that the plaintiff was not privy to Seymour's wrong; that he lent his money innocently, and therefore, as is objected, more reasonable the loss should fall on the plaintiff than defendant; and for this was cited *Salk.* 289. But that is not this case; the jewels here were sealed up with the plaintiff's own seal, which resembles the locking a box, and taking away the key, 1 *Inst.* 19. There is no fault in the plaintiff. Then to consider what is the law touching sales in open shops; that sales in open shops does not alter the property of a stranger, as sales in market-overt or fairs, *Moor* 625. That a custom of London pleaded, that every freeman might buy all manner of wares in every shop in London, is too general; for then a scrivener might buy plate in his shop, and the like, which is unreasonable, *Cro. Jac.* 69. *Bacon's Use of the Law*, 80. 5 H. 7. 15. By these cases it appears, that the true owner never lost the property of his goods by sale, unless in a market-overt. For the defendant it was insisted, that if a person who lost money with the plaintiff at play, and gave him for payment a goldsmith's note, the goldsmith shall not be obliged to pay this note, the plaintiff being a person within the meaning of the gaming act. This is true; but if the plaintiff had negotiated this note to a 3d person, then the case would have been between two persons strangers to the provisions of the gaming acts, and so those acts would not take place, as between acceptor and assignee of the note, *Carth.* 357. *Salk.* 344. So where bank-bill, payable to A. or bearer, and A. loses the note, and the stranger who found it transfers it, for valuable consideration, to C. the money being paid to bearer, discharges the drawer; for 'tis the very terms of the note, and by course of trade these notes are looked upon as change of money for money; but there is no such course of trade with respect to goods: the property does not follow the possession, unless in cases where the owner has no mark to know his own again, as in money, *Cro. Eliz.* 746. *HIGGS v. HOLLIDAY*, *Salk.* 283. *FORD v. HOPKINS*. In the present case the owner never gave any power to sell or dispose of them, and possession merely does not change the ownership of goods, tho' it does of money. If bill or note

note is made payable to A. or bearer, if no indorsement, the vendee is without remedy against vendor; for these notes are looked upon as lodging money for money. The next matter for consideration is, whether the place where the pawn is made will intitle the defendant to retain these jewels. On the finding, it is insisted that sales in open shops are the same as sales in market-overt: but by this special verdict no custom is found, and, unless it was found, the court cannot take notice of such a custom; as was determined in the case of *ARGYLE v. HUNT*, in this court, Trin. 5 Geo. 1. where a libel in the spiritual court, for calling a woman a whore, and after sentence applied for a prohibition, yet denied; for that the court would not take notice of the custom of London; where 'tis actionable to call a woman a whore, Carth. 75. Then 'tis objected, that upon the finding of the jury, the custom is to be certified. Hob. 86. Cro. Car. 516. Cro. Jac. 69. But this case is not within the custom, as to sales in market-overt; for pawns, as this is, and sales are quite different; and a custom which extends to sales in market-overt, will not include pawns or pledges; and for that purpose 35 H. 6. Fo. 25. is in point, where 'tis expressly said, that the custom extends to a sale, and not to a pawn. There is no instance where this case has been allowed, with respect to pawns.

(C) The several Sorts of Bailments.

1. **T**HERE are six sorts of bailments. The first sort of bailment is a bare naked bailment of goods, delivered by one man to another, to keep for the use of the bailor, and this I call a *depositum*; and it is that sort of bailment which is mentioned in Southcote's case. The 2d sort is, when goods or chattels, that are useful, are lent to a friend gratis, to be used by him; and this is called *commodatum*, because the thing is to be restored in specie. The third sort is, when goods are left with the bailee, to be used by him for hire: this is called *locatio & conductio*, and the lender is called locator, and the borrower conductor. The 4th sort is, when goods or chattels are delivered to another as a pawn to be a security to him for money borrowed of him by the bailor; and this is called in latin *vadium*, and in English a pawn or a pledge. The 5th sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward, to be paid by the person who delivers them to the bailee, who is to do the thing about them. The 6th sort is, when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage; per Holt Ch. J. 2 Ld. Raym. Rep. 912, 913. Trin. 2 Ann. in case of *Coggs v. Barnard*.

Comyns's
Rep. 134.
pl. 90. S. C.
and same
division.

(D) Revocable. Or Property altered. In what Cases.

1. **D** *Detinue against baron and feme, and counted of bailment of sheep, to the feme before the coverture, by which the defendant said, that after he took the feme to wife, and the sheep were bailed to him to compester the land, by which he commanded him to take his cattle, and he would not, wherefore the defendant took the cattle in his land, damage feasant; and demanded judgment if of such taking, &c. And the opinion of Thorpe was, that it is a good discharge of the bailment, without other possession in the plaintiff again, by which the plaintiff traversed the commandment. Quod nota. Br. Detinue de Biens, pl. 13. cites 43 E. 3. 21.*

2. *Where I bail 10l. to J. N. to deliver to P. and J. N. offers it, and P. refuses, I shall have debt against J. N. For he shall not retain the 10l. for the refusal of P. where there is no default in me. Br. Conditions, pl. 53. cites 19 H. 6. 34.*

3. *If a feme covert bails goods to a man, and after she takes him to baron, and he dies, the feme shall not have action of bailment; for the bailment was discharged by the inter-marriage; but she may declare upon a trover. Quod nota, per Fineux. Br. Bailment, pl. 6. cites 21 H. 7. 29.*

D. 49. a. pl.
7. Pasch.
33 H. 8.
Lyte v.
Penny.

4. *A delivers 20l. to B. to the use of C. a woman, to be delivered her the day of her marriage. Before her marriage A. countermands it, and calls home the money. C. shall not be aided in chancery, because there is no consideration why she should have it. Cary's Rep. 12. cites D. 49.*

2 Le. 89. pl.
113. Mich.
29 Eliz.
S. C. in
totidem ver-
bis. —
D. 49. a.
Marg. pl.
70. cites

5. *If goods be bailed, to bail over on a consideration precedent, on his part, to whom they ought to be bailed, the bailor can't countermand it; otherwise where 'tis voluntary and without consideration. But where 'tis in consideration of a debt, it is not countermandable; otherwise if it be to satisfy the debt of another. Per Egerton. Le. 30. pl. 36. Mich. 31 Eliz. Clerk's case.*

Mich. 31. & 32 Eliz. Clerk v. Archdale, in the exchequer, S. P. adjudged, that the property is immediately altered. — As if A. indebted to B. by bond, delivers some hogheads of wine to C. to satisfy B. his debt. C. was surety for A. to B. Adjudged that the property of the goods, by the delivery over by C. is altered. 2 Le. 89. pl. 113. Mich. 29 Eliz. in the exchequer. — 2 Bulst. 306. Isaac v. Clark, S. C. — S. P. agreed Arg. Cro. J. 687. pl. 1. Trin. 22 Jac. B. R. in case of Harris v. Bervoir. — S. P. accordingly by Doderidge J. and so by Ley Ch. J. if the 3d person, to whom it was to be bailed over, assents, it is not countermandable. 2 Roll. Rep. 441. Trin. 21 Jac. B. R. in S. C. — Yelv. 4. in a note on the case of Riches v. Briggs.

6. *If A. bails goods to B. at such a day to rebail, and before the day B. sells the goods in market-overt, yet at the day bailor may seize the goods, because the property of the goods was always in him, and not altered by the sale in market-overt. Godb. 160. pl. 224. Mich. 7 Jac. B. R. Anon.*

7. A, indebted in 100l. to B. delivers goods to C. amounting to the value of the debt, to satisfy B. the said 100l. with the goods in his hands. B. has an interest and property in the goods. Yelv. 164. Mich. 7 Jac. B. R. Brand v. Lilley.

* (E) Actions and Pleadings.

1. **D** *Detinue in London upon bailment made by the plaintiff to the defendant, &c.* He said that he bailed it to him in another county, in pledge, &c. and no plea, per Finch, if he does not traverse the bailment in the first county; and after they were at issue, if it was bailed in pledge or not, and the visne was where the receipt in pledge is supposed. Br. Traverse per, &c. pl. 41. cites 46 E. 3. 30.

2. *Detinue of certain charters.* The plaintiff counted of bailment by him to the defendant, who said that he found the deeds by fortune in his house, and J. N. had brought the like writ against him to return them now, and prayed that they interplead, absque hoc that the plaintiff bailed to the defendant as here; and a good plea, per Martin, and the bailment traversable as here: for if he confesses bailment, then he charges himself to the plaintiff, and to the said J. N. also. Quod nota: for it was not contradicted. Br. Traverse per, &c. pl. 60. cites 7 H. 6. 22.

S. P. but now he shall be charged to him who has right. Br. Bailment, pl. 5. cites S. C.

3. *Detinue supposing the bailment to the defendant at B. in the county of N. to rebail, &c.* The defendant said, that the same day and year, at B. in the county of B. the plaintiff bought the goods of the defendant for 10l. upon condition, that if he did not pay the 10l. such a day, that the sale shall be void, and that he did not pay at the day, absque hoc that the plaintiff bailed them in the county of N. to rebail, prout, &c. and admitted for a good plea. Br. Traverse per, &c. pl. 65. cites 8 H. 6. 10.

4. *Trespass of taking his bowl.* The defendant said that the plaintiff delivered it to W. E. in pledge, who bailed it to the defendant, who rebailed it to W. E. and the plaintiff said, that R. C. gave to him, and the defendant took it, absque hoc that he bailed it to W. E. in pledge, and did not traverse the bailment by W. E. to the defendant, and well; for the bailment of the plaintiff to W. E. is the effect of the bar, which binds the plaintiff. Br. Traverse per, &c. pl. 373. (bis) cites 10 H. 6. 25.

5. *Detinue by feme upon bailment made by herself of a chest of charters; the defendant said, that they came to him as executor of the executor of the father of the plaintiff, whose heir she is, and that he had delivered them to the baron of the plaintiff who is dead, absque hoc that the plaintiff bailed them prout, &c.* and a good plea; for the bailment of the baron without the traverse, nor the traverse without the plea precedent, is not good. Br. Traverse per, &c. pl. 374. cites 11 H. 6. 9.

6. *In detinue, the plaintiff counts upon simple bailment, the garnishee may say that it was upon condition, without traversing the simple*

Bailment.

simple bailment, and if the plaintiff says that it was bailed upon other condition, then he ought to traverse the condition alledged by the garnishee, and so he did, and well; per cur. Br. Confess and Avoid, pl. 62. cites 11 H. 6. 50.

S. P. per
Newton, in
a note. Br.
Bailment,
pl. 3. cites
S. C.

7. If the plaintiff brings *detinue in the county of C. and counts upon simple bailment*, it is a good plea that it was delivered in another county upon condition, &c. absque hoc that it was delivered in the place, &c. by reason of the double charge, if action be brought of this again in the county; quod non negatur. Br. Traverse per, &c. pl. 22. cites 33 H. 6. 25.

8. *Detinue of a box of charters, and one charter specially bailed to the defendant*, and he pleaded to the bar non detinet, and to the charter special made title to the land, of which, &c. absque hoc that the plaintiff bailed to him to re-bail, &c. and no plea, because the defendant did not confess any livery made by the plaintiff, quod fuit concessum. Br. Traverse per, &c. pl. 29. cites 34 H. 6. 42.

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9. *Contra where he confesses delivery by the plaintiff, to him to bail over, which he has done*, absque hoc that he bailed to re-bail to him, this is a good traverse. Br. Ibid.

10. *And per Moil, he may intitle himself to the land and deed, and give colour of possession to the plaintiff*, and nevertheless well, but not to traverse the bailment as above. Br. Ibid.

Br. Repli-
cation, pl.
39. cites
S. C.—And
where the
plaintiff and
defendant
claims by one
and the same
person, there
the traverse
of the gift
is good, and
so here; per
tot. cur. Br.
Traverseper,
&c. pl. 200.
cites 5 E.
4. 133.

11. *Trespas against H. G. of a box of evidences taken, the defendant said, that J. G. his father was possessed thereof, and gave it to the defendant, by which he was possessed, and after delivered it to A. B. to keep to the use of the defendant, who after delivered it to the plaintiff to keep to the use of the defendant, and the defendant required him to deliver it, and he refused, by which the defendant took it; the plaintiff said, that J. G. gave them to him, absque hoc that he gave them to the defendant prout, &c. and so to issue, and found for the plaintiff*, who prayed judgment, and the defendant pleaded in arrest of judgment, that the bar is not answered, for the substance of the bar is, that the defendant bailed them to his use, which ought to be traversed, and not the gift, but after long argument tota curia e contra. Br. Traverse per, &c. 200. cites 5 E. 4. 133.

12. *In detinue of charters, the defendant may traverse the bailment, because he cannot wage his law*. Br. Traverse per, &c. pl. 228. cites 8 E. 4. 3.

13. *But where he may wage his law, there he cannot traverse the bailment, by all the justices*. Br. Ibid.

14. *If bailee brings trespas, he shall say, ad damnum to himself; for he shall be charged over*. Br. Damages, pl. 124. cites 8 E. 4. 6.

15. *Detinue of charters against J. N. son and heir of J. N. and counted of bailment made by the plaintiff to the defendant, who said, that he is son and heir of W. and not son and heir of J. N. Per Moyle, this is no plea, because it is of his possession, and not brought against him as heir, and so it is surplusage, as in trespas de son tort demesne is no plea*. Br. Traverse per, &c. pl. 235. cites 10 E. 4. 12.

16. *Contra*

16. *Contra in debt* against him as heir, or in *detinue* against him as heir. Br. Ibid.

17. In *detinue* of bailment of the plaintiff to the defendant, to re-bail to him, it is a good plea that he bailed to him to bail to J. N. which he has done, without that that he bailed to him to re-bail to the plaintiff, prout, &c. and a good plea, though the defendant may wage his law. Br. Traverse per, &c. pl. 243. cites 12 E. 4. 11. 21.

18. So of bailment upon condition in another county, there he shall traverse the bailment in the first county. Br. Ibid.

19. *Detinue* of goods, and counted of bailment, the defendant said, that the same day, &c. and at another time the plaintiff gave to the defendant the same goods, absque hoc that he bailed them to the defendant prout, &c. and per tot. cur. except Bryan, it is no plea; for it is only argument. Br. Traverse per, &c. pl. 275. cites 22 E. 4. 29.

20. If A. delivers B. cloth to keep, and B. keeps it negligently, A. may have either *detinue* or *action on the case*; per Gawdy J. Goldsb. 152. pl. 79. cites 2 H. 7.

21. Debt was brought against T. because N. was indebted to the plaintiff, and delivered the money to the said T. to deliver to the plaintiff, which he did not do; quod nota. Br. Dette, pl. 6. cites Lib. Intrat.

22. Whether, in case of bailment of goods to a testator, the executor in *detinue* against him must be named executor? See Kelw. 118. b. pl. 62. *Casus incerti temporis*.

23. If money is delivered to a man to buy cattle, or to merchandize, with, though the money be sealed up in a bag, yet the property of the money is in the bailee, and the bailor cannot have action for the money, but only an *account*, though he never buys or merchandizes. 3 Le. 38. pl. 62. Mich. 15 Eliz. B. R. Anon.

Kelw. 77. b. per Fro-wike S. P. if the goods are either lost or destroyed.

[15]

Per Powel J. if I give money to another to buy goods for me, and he neglects to buy them,

for this breach of trust I shall have election to bring *debt* or *account*, and cited 4 or 5 cases; but per Holt Ch. J. contra if the party did not take it as a *debt*, but *ad computandum*, or *ad merchandizandum*, it must be an *account*, and he shall have the benefit of an accountant, which is, he may plead being robbed, which shall be a good plea in the last case, and not in the first. Adjourned. 11 Mod. 92. pl. 16. cites 2 Lev. 5.

24. If A. lends money to B. and B. delivers a thing of the value to A. in pawn, now the conversion is traversable, though generally conversion is not traversable but upon special matter; per Wray and Fenner J. and so in the principal case, which was, a bag of money was delivered to C. by A. and B. to keep till A. and B. were agreed. Le. 247. pl. 335. Trin. 33 Eliz. B. R. Anon.

25. Debt upon bill sealed, whereby defendant acknowledged that he had received 7l. *ad emend'* such and such things, and avers, that he had not bought the things, or paid the money. It was held, that plaintiff might bring either debt or account at his election. Cro. E. 644. pl. 48. Mich. 40 & 41 Eliz. B. R. Lincoln (Earl) v. Topcliff.

S. C. cited Noy 72. in case of Britton v. Barton.

Noy 73.
S. C. ac-
cordingly.

26. If money is delivered to be re-delivered, it cannot be known, and therefore the property is altered, and *debt* lies for it; but if *Portugal*, or other money which may be known, be delivered to be re-delivered, *detinue* lies. *Ow.* 86. *Mich.* 41 & 42 *Eliz.* *Bretton v. Barnett.*

27. Action on the case, supposing that he had delivered to defendant certain wools to keep, and the defendant had converted them to his own use; per 2 justices the action well lies; (though it was urged, that the conversion doth not take away the property from the plaintiff, but that he may always have *detinue*) for they held, that the conversion did take away the property, and was an offence, for which this action lies, and adjudged accordingly, *ceteris justiciariis absentibus.* *Cro. E.* 781. pl. 17. *Mich.* 42 & 43 *Eliz.* *B. R.* *Gumbleton v. Grafton.*

28. Bailee in case of robbery, where he accepted the goods to keep safely, is chargeable in *detinue* for them, because he has his remedy over by *trespass* or *appeal* to have them again. *Cro. E.* 815. pl. 4. *Pasch.* 43 *Eliz.* *B. R.* *Southcott v. Bennet.*

29. A. delivers to B. a bag of money sealed, B. promises to deliver it on request, no *assumpsit* lies on this, for B. has no benefit by it; for the money being in a bag sealed, B. cannot have any use or employment of the money at all, and so has only a charge imposed for the keeping. *Yelv.* 50. *Mich.* 2 *Jac. B. R.* in the case of *Game v. Harvy.*

30. A. delivered money to B. to the use of C. In such case C. may have *debt* on account against B. for the same at his election. *Godb.* 210. pl. 299. *Mich.* 11 *Jac. C. B.* *Clerk's case.*

31. In case the plaintiff declared, that he delivered a bond to the defendant, to keep and re-deliver it upon request; and afterwards the defendant tore it. The defendant pleaded, that the plaintiff delivered it to him to be cancelled, and which he did; and upon demurrer *Doderidge* and *Crooke* held, that delivery to be re-delivered ought to have been traversed; but *Coke* and *Haughton* *contra*; for they held, that the delivery is only an inducement; but that the tearing is the point of the action, and therefore the delivery need not to be traversed. *Roll. Rep.* 394. pl. 16. *Trin.* 14 *Jac. B. R.* *Pope v. Butler.*

32. If A. bail the goods of C. to B. and C. the owner brings *detinue* against bailee for them, B. may plead the bailment by A. to him to be re-delivered by A. and so bring in A. as *garnishee* to interplead with C. per *Holt Ch. J.* 6 *Mod.* 216. *Trin.* 3 *Ann. B. R.* at a trial of *Rich v. Aldred.*

[16]

33. If A. bails goods to C. and after gives his whole right in them to B. B. cannot maintain *detinue* for them against C. because the special property that C. acquires by the bailment is not thereby transferred to B. per *Holt Ch. J.* 6 *Mod.* 216. *Trin.* 3 *Ann. B. R.* *Rich v. Aldred.*

For more of Bailment in general, see *Account*, *Detinue*, *Entrepreader*, and other proper Titles.

Bar.

Fol. 353.

(A) Action. [One Action where Bar of another Action of the like Nature.]

[1.] **I**N an action upon the case, upon an *assumpsit* to pay a certain sum upon request for such a thing bought, if the plaintiff be barred by verdict upon non assumpsit modo & forma pleaded, yet in a new action for the same sum, for the same thing, if the count be upon an *assumpsit* to pay the sum at several days, the first verdict and judgment shall not be any bar thereof, though it be averred to be the same contract, for it cannot be the same contract, this being to be paid at several days. My Reports, 14 Jac. PAYNE AGAINST SELLE.]

Roll. Rep.
391. pl. 12.
S. C. ad-
judged for
the plaintiff.

[2. But otherways it had been if he had recovered in the first action. My Reports, 14 Jac. (but QUERE, for it seems that this cannot be the same promise.)

Roll. Rep.
392. pl. 12.
Coke Ch. J.
said, that
preadven-
ture,

if the plaintiff had recovered in the first action, it should be a bar in this action, quod fuit concessum, per Doderidge. But the reporter says, quere, because it cannot be intended the same contract.

[3. If a man grants a rent to another, payable at a certain day, and covenants to pay the rent accordingly; if the grantee after recovers in an action of covenant for the non-payment of the rent, this will be a bar of any action after for the rent; for in the action of covenant, he shall recover all the rent in damages. Mich. 7 Jac. B. between STRONG AND WATTS, per curiam.]

[4. If A. demises lands to B. for life with warranty, and after a warrantia charta is brought upon this warranty by B. against A. and after B. brings an action of covenant against A. upon the same warranty, and assigns for breach, that the said A. before the lease to B. demised it for years to I. S. who hath entered and evicted him: it is no bar of this action of covenant, that B. hath a warrantia charta depending upon the same warranty, because *this action is grounded upon the eviction of a chattle, scilicet, a lease for years, in which there cannot be any voucher, rebutter, or warrantia charta. Hobart's Reports 5. between RUDGE AND PINCOMB.]

*[17]
Hob. 3. pl.
6. Pincomb
v. Rudge
S. C. ad-
judged; and
upon error
brought in
the exche-
quer cham-
ber, all the
judges a-
greed that
this action
lies.—Vel.
139. Mich.
6 Jac. B. R.

S. C. adjudged. — Roll. Rep. 25. Pasch. 12 Jac. S. C. and judgment affirmed in the exchequer chamber. — Noy 131. Pinkard v. Ridge, S. C. and the court held that covenant well lies, notwithstanding the warrantia charta pending. — Jenk. 291. pl. 31. S. C.

Hob. 128.
pl. 161.
S. C. in
much the
same words.
— Mo.
864. pl.
1193.
Mich. 14
Jac. S. C.

and the court adjudged that he should answer neither of them, and says it is like two replevins by two persons at one time for the same taking, the defendant shall answer neither of them. — See tit. Information (D) pl. 4.

[5. If an informer exhibits an information against B. upon the statute for taking farms, and the same day C. exhibits an information for the same case against B. In this case the defendant may plead the truth of the case to both, and bar them; for inasmuch as there is not any precedency of suit to attach it in either of them; the court cannot give judgment for either of them. Hobart's Reports 171. between PIE AND COOK, per cur.]

6. After the bringing of assise of mortdancefloor, the same demandant brought writ of admeasurement of dower against the same tenant of the same land. Thel. Dig. 151. lib. 11. cap. 38. f. 9. cites 13 E. 1. It. North. Estoppel 272.

7. A feme, after the bringing the assise, may maintain writ of dower ex assensu patris, of the same land. Thel. Dig. 151. lib. 11. cap. 38. f. 10. cites Tempore E. 1. Estoppel 271.

8. A man was disseised, and afterwards he brought dum fuit infra etatem, against the disseisor, in which he was nonsuited, and afterwards was received to maintain writ of entry sur disseisin against the disseisor well enough. Thel. Dig. 151. lib. 11. cap. 38. f. 6. cites Mich. 5 E. 2. Estoppel 257.

9. In formedon of a gift made to his mother and her baron in frank-marriage, notwithstanding that the demandant be nonsuited after the view, yet he may maintain a new writ of the same land, supposing the gift be made to his mother and the heirs of her body, &c. Thel. Dig. 152. lib. 11. cap. 38. f. 14. cites 3 E. 3. Iter' Not' Estoppel 134.

10. Another diversity there is in actions real and personal, between plea to the action of the writ, and plea to the writ; as formedon in remainder, where it should be formedon in reverter; such action without judgment upon verdict or demurrer, &c. does not bar the demandant of his rightful action; and therefore if demandant in such cases be nonsuited, or the plea be discontinued, he may bring his rightful action, and with this accords 27 E. 3. 84. 6 H. 4. 4. 2 R. 2. Estoppel 210. 4 E. 3. 54. But if the plea is only to the writ, so that the same nature of the writ remains, there though the plea to the writ be adjudged against the demandant upon demurrer or verdict, &c. yet he shall maintain the same writ again; for the judgment extends only to the writ. 6 Rep. 7. b. 8. a. in Ferrar's case cites 3 E. 3. Estoppel 134. & 30 Ass. 8. accordingly.

11. If a man brings writ of mesne, supposing the defendant to be mesne between him and one A. yet afterwards he may have writ, supposing another to be mesne between him and the defendant of the same land. Thel. Dig. 152. lib. 11. cap. 38. f. 30. cites Patch. 29 E. 3. 44.

12. If one bring writ of ward against one, of the heir of one Jo. and the defendant dies, the plaintiff may have writ of ward against his executors of the same infant, supposing him to be heir to another.

Thel.

Thel. Dig. 153. lib. 11. cap. 38. f. 37. cites Hill. 31 E. 3. Brief 332.

* 13. A man shall only have one *appeal of the death* of the same person, and such plea to the writ was adjudged good. Thel. Dig. 153. lib. 11. cap. 38. f. 40. cites Mich. 9 H. 4. 1.

14. Writ of *trespass against 3* was discontinued, and the plaintiff brought *another writ against two of them* of the same trespass, and was maintained. Thel. Dig. 153. lib. 11. cap. 38. f. 41. cites Mich. 11 H. 6. 10.

15. In *debt upon an obligation supposed to be made to B.* the plaintiff was nonsuited, and brought *another writ upon the same obligation, and counted that it was made to C.* and held a good writ per Juyn. Thel. Dig. 153. lib. 11. cap. 38. f. 42. cites 14 H. 6. 9. and that so agrees 6 H. 4. 4. and says, see 21 H. 7. 24.

16. Where writ of *replevin is abated*, and the defendant has return, yet the plaintiff shall have *another replevin* of the same taking, for such return is not irreplegiable. Thel. Dig. 153. lib. 11. cap. 38. f. 43. cites Pasch. 34 H. 6. 37. and that so agrees Wood, Mich. 12 H. 7. 5.

Where one sues *replevin* and is nonsuited, and the defendant has return, the plaintiff shall

not have another replevin, but second deliverance by the statute. Thel. Dig. 153. lib. 11. cap. 38. f. 45. cites Mich. 19 E. 2. Replevin 25.

17. A bar in one *formedon in descender*, is a good bar in any other *formedon in descender*, to be brought afterwards, *of the same gift*. Co. Litt. 393. b.

18. In *ejectment*, the defendant pleaded in bar *a recovery had in B. R. against the lessor of the plaintiff*. This was held by Anderson, Periam, and Rhodes, to be a good bar. Goldsb. 43. pl. 22. Mich. 29 Eliz. Clayton. v. Lawton.

19. A bar in any action real or personal, *by judgment upon demurrer, confession, verdict, &c.* is a bar as to this or like action of the same nature, for the same thing for ever. Resolved. 6 Rep. 7. a. Mich. 40 & 41 Eliz. C. B. in Ferrer's case.

S. C. & S. P. cited Skin. 58. pl. 1. Mich. 34 Car. 2. B. R. in

case of Foot v. Rastall, and the court held it to be good law: but Pemberton Ch. J. said it was to be understood when it appears judicially to the court, that the evidence in the one action would maintain the other; but otherwise, he said, the court shall intend that he has mistaken his action.

20. But there is a *diversity between real and personal actions*; for in personal actions, as in debt, account, &c. the bar is perpetual, because the plaintiff cannot have an action of a more high nature, and therefore in such case he has no remedy, but by error or attain; but if the demandant be barred in a real action by judgment upon verdict, demurrer, confession, &c. yet he may have an action of a higher nature, and try the same right again, because it concerns his freehold and inheritance. Resolved. 6 Rep. 7. a. b. Mich. 40 & 41 Eliz. C. B. Ferrer's case.

21. Another *diversity* there is in *real actions between persons that have not the mere right, but only a qualified right*; though such are

barred in real actions, without making such as have interest parties, it shall not bind the successor, as parson, prebendary, &c. For in such case, if a new action of the same nature be brought against the successor, he may falsify; and the recovery does not make any discontinuance, but that the successor may enter. But otherwise it is of abbots, bishops, &c. who *have the entire fee in them*; for in such cases the successor, at the common law, shall not falsify in sci. fa. or in a new action of the same nature, and the law is the same when a recovery is had against them. 6 Rep. 8. a. in Ferrer's case.

[19]

22. In *trover and conversion brought of an ox*, the defendant pleaded that at another time the plaintiff, and another person, now dead, brought an action against J. S. and two others for the same ox, who justified as for a heriot; and upon demurrer, adjudged against the then plaintiffs, and averred that the taking was the same, &c. and that the trover, &c. in this act, supposed to be by this defendant only, was committed by the other defendants with him, and that the omitting them in this action, and the omitting this defendant in the former action, was covenantously done, et hoc paratus, &c. Judgment if the plaintiffs to this action, of the same matter, shall be received, &c. *Walmesley and Kingmill* held the bar good; but *Anderfon and Glanville* e contra. Et adjournatur; and afterwards it was ended by arbitrement. Cro. T. 667. pl. 24. Pasch. 41 Eliz. C. B. *Ferrers v. Arden*.

23. Motion made, that plaintiff may file his original, and enter up the issue on record; for he hath since *arrested the defendant 3 times for the same cause of action*; and the defendant doubted whether he might plead in bar another action pending; with a *prout patet per record*, before it was entered. Per cur. he may; if they do not enter it, you may without any motion in court, give a rule to enter it. 12 Mod. 91. Pasch. 8 W. 3. *Armitage v. Row*,

(A. 2) Where bringing an Action of one Nature shall be a Bar to the bringing an Action of another Nature.

1. TWO executors with another named executor in the testament, and afterwards removed by the testator, brought writ of debt, which took final issue without challenge of the party; and afterwards the two executors, without naming the 3d, being alive, brought writ of debt against the same defendant, and adjudged good. Thel. Deg. 151. lib. 11. cap. 38. f. 11, cites *Hill* 8 E. 2, *Estoppel* 267,

2. In *quod permittat of common appurtenant*, &c. the tenant said that the demandant at another time brought writ of right of the same common, of the seisin of the same ancestor, against the predecessor of the tenant, who demanded the view, &c. in which writ the demandant was nonsuited, judgment of this writ brought of a
more

more base nature, &c. Adjudged a good plea, and the demandant took nothing by his writ. Thel. Dig. 151. lib. 11. cap. 38. f. 7. cites Hill. 12 E. 2. Estoppel 261.

3. After one is barred in *affise*, he may have *affise of mortdancer*. Thel. Dig. 151. lib. 11. cap. 38. f. 12. cites 4 E. 3. It. Derby Estoppel 133. But adds, *quære*; for it is said that he shall not have it without *special remonstrance* [matter shewn:] *as where the heir enters upon the discontinuee, or descent, and he re-enters*, &c. Per Littleton and Jenny. Mich. 12 E. 4. 13. *quære*.

If a man be barred in *affise* of novel disseisin, yet upon shewing of a descent or other special matter,

ter, he may have *affise* of mortdancer, *ayel*, *befaiel*, *entre sur disseisin* to his ancestor. Resolved. 6 Rep. 7. b. Mich. 40 & 41 Eliz. C. B. in Ferrer's case.

4. Where one is nonsuited after appearance in writ of *befail*, he may well have writ of *cofnage* against the same tenant of the same land, of the same dying seised of the same ancestor. Thel. Dig. 152. lib. 11. cap. 38. f. 16. cites Mich. 4 E. 3. 168. and 29 E. 3. 21. And a man may vary from the descent made by the ancestor of the demandant in another writ. Ibid. cites Mich. 13 H. 4. 14. in *scire facias*.

And notwithstanding that a man brings writ of *ayel*, and is nonsuited after appearance, yet he may have writ of

formedon in the descender, of the same land against the same tenant, upon gift in tail made to the same grandfather. Thel. Dig. 152. lib. 11. cap. 38. f. 20. cites Patch. 9 E. 3. 454. and 6 H. 4. 3. accordingly in mortdancer.

* And where in *affise of flagno exaltato ad nocumentum liberi tenementi*, &c. after issue taken upon the enhancement, the plaintiff was nonsuited, yet he was received to maintain *affise of nuisance quare levavit*, the same *flagnum ad nocumentum of the same frank-tenement*. Thel. Dig. 152. lib. 11. cap. 38. f. 19. cites Patch. 8 E. 3. 389.

* [20] And concordat 4 E. 3. that bringing of writ of entry is no

5. In *affise*, it is no plea in bar of the *affise*, that the plaintiff had brought against him writ of *formedon of the same land in which the view is made*; for it seems to be a plea to the writ, and not in bar. Br. Barre, pl. 60. cites 14 Aff. 6.

bar in *formedon*. Ibid.

6. In *affise* against tenant for life, and him in reversion, who was received in default of the tenant for life, and pleaded the bringing of a writ of a more high nature against the tenant for life, &c. And it was held a good plea, in his mouth in bar of *affise*, without shewing record thereof sub pede sigilli. Thel. Dig. 152. lib. 11. cap. 38. f. 22. cites 16 Aff. 17.

7. In *quare impedit* by the king against a bishop, the bishop said, that the king at another time had brought *quare non admittit* against him of the same church, supposing that the defendant had nothing, but only as ordinary, &c. Judgment of this writ, in which the defendant may claim the advowson, and adjudged no plea. Thel. Dig. 153. lib. 11. cap. 38. f. 46. cites Pasch. 16 E. 3. *Quare Impedit* 145.

8. After the bringing of *affise*, the feme had *cui in vita* of the same land of her own seisin, notwithstanding that it was found by the *affise* that she was never seised. Thel. Dig. 152. lib. 11. cap. 38. f. 23. cites Mich. 17 E. 3. 65. But adds *quære*, the tenant in the *cui in vita* durst not demur.

But it was adjudged, where he had brought *formedon in remainder, claiming fee-tail* by the remainder,

and the writ *obted by ley gager of non-summons*, that he should maintain *formedon in descender* against the same tenant of the same land well enough. Thel. Dig. 152. lib. 11. cap. 38. f. 25. cites Mich. 18 E. 3. 98.

9. After the bringing of *dum non fuit compas* of the seisin of his ancestor *demanding fee simple*, to which suit he appeared, he cannot maintain *formedon in descender* against the same tenant of the same land, making his descent by the same ancestor; by judgment. Thel. Dig. 152. lib. 11. cap. 38. f. 25. cites Mich. 18 E. 3. 31.

10. In *dower* the tenant said, that the demandant had brought *cui in vita* against him of all the land of which, &c. of the demise of the same baron, to which writ she appeared, &c. and adjudged a good plea. Thel. Dig. 152. lib. 11. cap. 38. f. 24. cites Trin. 18 E. 3. Estoppel 221. & 33 Aff. 18. agreeing.

11. In *formedon*, if *issue be taken upon the gift, and found against the demandant* that he ne dona pas, &c. yet the demandant may afterwards have *assise of mortdancestor* upon the dying seised of the same ancestor to whom the gift was supposed to be made. Thel. Dig. 152. lib. 11. cap. 38. f. 26. cites Pasch. 19 E. 3. Estoppel 227.

12. In writ upon the statute of his servant and apprentice taken and cloigned; the defendant said, that the plaintiff, pending this writ, brought writ of *ravishment of ward* against the same defendant, supposing the ravishment out of his ward of the same person whom he supposes to be his servant, and held a good plea to the writ. Thel. Dig. 152. lib. 11. cap. 38. f. 29. cites 27 Aff. 21.

S. C. cited
par cur. 6
Rep. 7. b.
8. a. Mich.
40 & 41
Elix. C. B.

13. In *formedon in remainder*, if the demandant be nonsuited, he may well sue *scire facias out of a fine* for the same land against the same tenant, supposing that the land ought to revert to him. Thel. Dig. 152. lib. 11. cap. 38. f. 27. cites Mich. 27 E. 3. 84.

[21] 14. Upon a deed by which a man is obliged in a debt; and to render account, if the plaintiff brings writ of *account*, to which he appears, he may afterwards maintain writ of *debt*. Thel. Dig. 152. lib. 11. cap. 38. f. 28. cites 27 E. 3. 89. 28 E. 3. 98.

15. Feme, tenant for life, took baron, and was disseised, and after the death of the baron she brought *cui in vita upon the demise of her baron against one A.* who came and said, that he entered by another, and not by the baron, which was not denied by the feme, by which she took nothing by her writ, and afterwards she brought *assise against the heir of A. and others, disseisors*, who continued their estate by the first disseisin till she entered, and was seised till at another time disseised, and adjudged that the assise lay well. Thel. Dig. 153. lib. 11. cap. 38. f. 31. cites Mich. 30 E. 3. 24. 30 Aff. 48.

16. Where 3 *join in assise*, and afterwards are nonsuited, two of them, leaving out the one, may have a new *assise* of the same land in

in the life of him who is left out, well enough. Thel. Dig. 153. lib. 11. cap. 38. f. 32. cites 31 Aff. 14.

17. If a feme brings *cui in vita* against one, she cannot afterwards maintain *assise against the feoffee of the first tenant in the cui in vita*; but if the tenant in the *cui in vita*, disclaims, and she enters, and afterwards is ousted by his feoffee, then she shall have assise. Thel. Dig. 153. lib. 11. cap. 38. f. 34. cites 33 Aff. 18.

18. After *nonfuit in appeal of maihem* a man shall not have another appeal against the same defendants, supposing those who were principals in the one to be accessories in the other, & c. contra. Thel. Dig. 153. lib. 11. cap. 38. f. 35. cites 40 Aff. 1.

19. The demandant brought *formedon in remainder, and counted of the gift of S.* and afterwards he brought *formedon in descender, and counted of the gift of E.* and therefore well, by Finch. J. but he held, that it would have been otherwise had it been of the gift of one and the same person. Quære. Br. Estoppel, pl. 225. cites 40 E. 3. 14. 21.

Br. Brief, pl. 503. cites 40 E. 3. 21. S. C. & S. P. by Finchden clearly, and yet by the one the de-

mand was of a fee simple, and by the other of a fee tail. — Br. Formedon, pl. 77. cites S. C. & S. P. by Fincham J. Quære. But Belk. held, that the *formedon in remainder* is not more high than the writ of descender; for the *formedon in descender* is a writ of right in its nature. — Thel. Dig. 153. lib. 11. cap. 38. f. 38. cites S. C.

If the heir brings *formedon in descender*, yet he may have *formedon in remainder or reverter*. 5 Rep. 33. Pasch. 1 Jac. C. B. in Robinson's case. — S. C. cited, and S. P. resolved, though the heir is barred in *formedon in descender*; because *formedon in remainder or reverter* is an action of an higher nature, because in this a fee simple is to be recovered. 6 Rep. 7. b.

20. After bringing of *formedon*, the demandant cannot maintain *assise* of the same land, against the heir of the first tenant in *formedon*, without shewing title how, &c. Thel. Dig. 153. lib. 11. cap. 38. f. 36. cites Pasch. 43 E. 3. 17. and 43 Aff. 42.

21. After *nonfuit*, in appeal of *maihem* a man cannot have action of trespass of battery, and of this same *maihem*. Thel. Dig. 153. lib. 11. cap. 38. f. 35. cites 43 Aff. 39. 12 R. 2. Corone 110.

But after the plaintiff in appeal of maihem has recovered damages for

the *maihem*, he may bring writ of trespass of that battery, and recover damages for the battery. Br. Trespass, pl. 241. cites 22 Aff. 82. — Br. Appeal, pl. 60. cites S. C. — In trespass of assault and battery the plaintiff recovered, and had execution, and afterwards brought an appeal of *maihem* against the same person upon the same matter; the said recovery and execution was a good bar; cited Le. 19. pl. 24. by Ayloff J. as one Cobham's case.

22. If a man sues *replevin* of his beast taken, and has deliverance, he cannot have action of *trespass vi & armis* of the same taking. Thel. Dig. 153. lib. 11. cap. 38. f. 39. cites Hill. 5 H. 4. 2. and says, that such plea to the writ was held good. 38 E. 3. 41. 46 E. 3. 26. and 17 E. 3. 58.

23. After the bringing of writ of debt by one as administrator, he may have another writ as executor to the same deceased person against the same defendant. Thel. Dig. 151. lib. 11. cap. 38. f. 13. cites Pasch. 17 H. 6. Estoppel 273.

[22]
A. B. and C. executors of R. bring debt upon a bond, and the defendant pleads,

that before the purchase of this writ, the said A. one of the plaintiffs, as administrator of R. brought debt upon the same bond against the defendant, who then pleaded, that R. made executors, who administered, and traversed that he died intestate; and the plaintiff then replied, that administration was commit-

committed to him pendente lite between the executors of the said will, whereupon *defendant demurred*; and it was adjudged for him, and pleads this matter by way of estoppel, and demands judgment, if, as executor, he shall have an action upon the same bond against the same defendant; but judgment was now given for the plaintiff; for by the first judgment the plaintiff was only barred as to the action of the writ, viz. to have any action as administrator, but this mistake of his action is no bar nor estoppel to his bringing his true action. 5 Co. 32, 33. Pasch. 1 Jac. C. B. *Robinson's case*.—Cro. J. 15. pl. 20. *Robinson v. Robinson*, S. C. states it, that A. had taken out administration, he *not knowing at the time of taking it, or bringing the action, that there was any will*; and adjudged, the bringing the action as administrator is no bar to his bringing action as executor; [in which he was sole plaintiff, the other executor being dead] for though once a bar in a personal action is a bar perpetual, that is to be understood, when it is a bar to the right; but here it was not any bar, but by the misconceiving his action it abated, and so no bar to a new action.—S. C. and same distinction cited Arg. 2 Mod. 319.

24. In *rescous*, supposing that the defendant held of the plaintiff *one house and three acres of land, by 10 marks rent*. The defendant said, that the plaintiff at another time brought assise against him of the same rent, and made title that the defendant held the said house and three acres of land and a mill, of the plaintiff by this rent, in which assise he was nonsuited: judgment, if he shall be received now to say, that the rent is now issuing out of the house and the three acres of land only, &c. sed non adjudicatur; for the justices were in divers opinions. Thel. Dig. 153. lib. 11. cap. 38. f. 44. cites Brief 5 E. 4. 9. Mich. 7 E. 4. 19, 20.

25. In *debt against executor*, who said that the plaintiff had sued against the ordinary for the same debt, supposing that the testator had died intestate, and had judgment to recover; judgment of this writ sued against him as executor, &c. and adjudged no plea. Thel. Dig. 153. lib. 11. cap. 38. f. 47. cites 18 E. 4. 1.

26. *Trespass quare clausum fregit*, &c. the defendant pleaded, that before this time he had brought an ejectment against the now plaintiff, and recovered and had execution, &c. judgment si actio, &c. and this was adjudged a good bar, and the conclusion of the plea good. Leon. 313. pl. 437. Mich. 31 & 32 Eliz. C. B. *Kempton v. Cooper*.

Agreed by all, that damages recovered in an assumpsit may be a bar of a debt, yet it is not

so by law where the consideration is collateral. Cro. J. 119. pl. 7. Hill. 3 Jac. B. R. in case of *Lee v. Mynne*.—Yelv. 48. S. C.

27. If one be bound in an obligation, and afterwards promises to pay the money, assumpsit lies upon this promise; and if he recovers all in damages, this shall be a bar in debt upon the obligation; agreed by all the justices. Cro. E. 240. pl. 112. Trin 33 Eliz. B. R. *Ashbroke v. Snape*.

28. In *assumpsit to pay 100 l.* the defendant pleaded that the plaintiff had brought action of account against him for the same money; judgment si actio pending the action of account, adjudged and affirmed in error, that this is no plea in bar; because damages are recoverable in action on the case, but not in action of account. Mo. 458. pl. 633. Mich. 38 & 39 Eliz. *Barkby v. Foster*.

But unless he bring a writ of a more high nature than that in

which he was barred, he and his heirs are not only barred of the same action, but also, so long as the record

record of the judgment stands in force; he and his heirs are barred of their entry. 6 Rep. 3. a. resolved in S. C.

30. But recovery or bar in *assise*, is a bar in every other *assise*, and in writ of entry of *assise*: for both are of his own possession and of one and the same parties. 6 Rep. 7. b. in Ferrer's case. Regularly a bar in *assise* is a bar in an action of the same nature.

But this rule hath three exceptions, 1st, In case of a parson, prebend, or tenant in tail, as the book of 8 Ed. 3. 23. is. 2dly, If he be in from any title, as 10 H. 7. 5. 22 H. 6. 18. 3dly, If he be an infant, as 5 Edw. 3. 32. For an *assise* is not so strong an estoppel as other actions; per Mountague Ch. J. Cro. J. 467. pl. 13. Hill. 15 Jac. B. R. in case of Holford v. Platt.

31. Bar in a wrong action brought is not any bar where the right action is brought. Cro. E. 668. pl. 24. Pasch. 41 Eliz. C. B. in case of Ferrers v. Arden. As where one delivers goods to keep, and brings trespass against the bailee for those goods, and be barred by verdict or demurrer, that shall not be a bar in detinue or account, per Anderson and Glanville. But per Walmley J. where a title is pleaded in bar to a thing demanded, and by reason thereof, the plaintiff is barred upon demurrer or verdict, the interest thereby is bound, and the plaintiff shall be barred from bringing a new action, per Anderson and Glanville. Cro. E. 668. pl. 24. Pasch. 41 Eliz. C. B. in case of Ferrers v. Arden.

32. S. sold all his corn standing and growing in such a close for so much, and afterwards brought an *assumpsit* for the money. It was objected, that debt lay, but not this action; but it was held that a recovery or bar in this action, shall be a good bar in debt brought upon the same contract, and so vice versa, a recovery or bar in action of debt, is a good bar in action on the case upon *assumpsit*. 4 Rep. 92. b. 94. b. Trin. 44 Eliz. Slade's case,

(A. 3) Where the Heir may bring a Writ for the same Thing, for which the Ancestor had brought a Writ.

1. Notwithstanding the ancestor brought *formedon in remainder*, and died pending this plea, yet his son and heir may maintain writ of entry *sur disseisin* made to the same ancestor of the same land; because the one writ is not of a higher nature than the other. Thel. Dig. 152. lib. 11. cap. 38. f. 15. cites Pasch. 4 E. 3. 130. & 14 Aff. 6.

2. Where the ancestor has brought writ of right, in which view and voucher have been had, &c. yet his heir may maintain writ of entry of the same land, against one who was not party to the writ of right, nor heir to the party, per opinionem. Thel. Dig. 152. lib. 11. cap. 38. f. 17. cites Trin. 6 E. 3. 272. But ibid. f. 18. says Herle held the contrary, Pasch. 7 E. 3. 321, where the demandant

himself brought the one writ and the other, and the first tenant had infeoffed the second tenant with mortuaries of record sub pede sigilli, &c. and that such bringing of writ of a more high nature, shall abate writ of a more base nature, and cites 33 Aff. 18. agreeing.

3. Notwithstanding that the father has had *quod permittat of common of pasture*, yet his son and heir may have *assise* of the same

same common. Thel. Dig. 152. lib. 11. cap. 38. f. 21. cites 15 Aff. 3.

4. If demandant be barred in writ of error, on release of his ancestor, yet his issue in tail shall have a new writ of error; for he claims not only as heir, but per formam doni, and by the statute he shall not be barred by feint pleading or false pleading of his ancestor, so long as the right of the entail remains; resolved.

* 6 Rep. 7. b. in Ferrer's case, and says that with this agrees 10 H. 6. 5. & Dyer 188. pl. 8. 3 Eliz. Sir Ralph Rowlet's case.

5. In formedon in descender, if the demandant be barred by verdict or demurrer, yet the issue in tail shall have a new formedon in descender, upon the construction of the stat. of W. 2. cap. 2. Resolved. 6 Rep. 7. b. Mich. 40 & 41 Eliz. C. B. in Ferrer's case.

(B) Action. [Judgment in one Action, where a Bar in another Action by the same Person.]

S. C. cited Arg. 2 Mod. 42, 43. by the name of Leach v. Thompson.

* Fol. 354.

[1.] IN an action upon the case, if A. the plaintiff declares, whereas he *magnam curam de negotiis in lege* of B. the defendant, *habuisset & a permultis periculis ipsum preservasset*; and whereas the plaintiff at the request of the defendant, *eidem defendant promississet to take to wife the daughter of the defendant, the defendant did assume to pay to the plaintiff 1000l.* and upon non * assumpsit pleaded, the jury find for the defendant, and judgment is given accordingly; and after A. brings another action, and declares, that in consideration that the plaintiff, ante tunc, at the request of the defendant, *magnam curam de negotiis in lege* of the defendant *habuisset & ipsum defendantem a multis periculis preservasset*, and to the defendant *ad tunc*, at his request *promississet ducere in uxorem suam filiam defendantis*, the defendant did assume to pay to the plaintiff 1000l. *cum inde requisitus esset*. The judgment in the first action is not any bar of this action, because the promise is a collateral promise and the defendant promised to pay the 1000l. generally without any request, which is to be paid within a convenient time; but in the last promise it is to be paid upon request, which request is part of the promise, and a special request ought to be alledged, with the time and place of request, this being a collateral promise; but this is not to be alledged in the first promise, because no request is mentioned to be parcel of the promise, and therefore *these two promises differ materially*, and therefore the judgment in the first action is not any bar of this last action. Mich. 22 Car. B. R. between Leach and Bromsill, adjudged upon demurrer.]

9 E. 4. 51. a. In pl. 10. cites 40 E. 3. that it was held a good plea, and cites

2. Trespass in bank. The defendant pleaded that the plaintiff at another time recovered against him for the same trespass in London 40l. which he has been at all times ready to pay, and yet is; judgment, &c. and because the plaintiff could not deny it, but demurred because he had not taken execution, it was awarded that the

the plaintiff should take nothing by his writ; &c. Br. Trespass, pl. 39. cites 40 E. 3. 27. & 20 H. 6. 11. also 20 H. 6. the like matter.

3. Though the statute gives writ of quare ejecit infra terminum for the lessee who is ousted, yet he may have writ of covenant against his lessor, which is given by the common law; therefore quare in this case, if he brings *quare ejecit infra terminum* against the lessee also, if he shall not recover again. Br. Parliament, pl. 8. cites 46 E. 3. 4.

4. For he may recover twice in two quare impedit against several disturbers, by several writs of quare impedit. Br. Parliament, pl. 8. cites 46 E. 3. 4.

5. Notwithstanding a recovery be had in assise against one, yet he shall be restored to his first action to demand his right; as in the case * of a *farmedon, cui in vita*, and the like. 6 H. 4. 2. a. in a nota of the reporter, cites S. C. per Markham.

and in Marg. cites Doct. Placitandi, 65.

6. In debt, if the defendant pleads a former recovery by the plaintiff in plea real or personal, without execution, it is no bar; because he that recovered may, at his pleasure, bring a new writ. Heath's Max. 63. cites Br. Bar. 12. 20 H. 6. and 43 Ed. 3. Br. Barre, pl. 11. cites 43 E. 3. 2. & 20 H. 6. 12. S. P. per Thorpe.

7. In trespass, judgment in another writ of trespass of the same trespass is no plea, without execution. Br. Execution, pl. 5. cites 20 H. 6. 11, 12. S. P. and so in account, debt, and the like. Br. Barre, Br. Judgment.

pl. 43. cites 9 E. 4. 50. by Danby and Moile; but Littleton and Choke e contra. — Br. Judgment, pl. 47. S. P. accordingly, but the year and page is misprinted. — Br. Account, pl. 57. cites S. C. & S. P. accordingly, as to account.

8. A recovery upon bailment in one county cannot be intended a recovery upon bailment in another county, nor it shall not serve for bar there. Br. Judgment, pl. 32. cites 21 H. 6. 35.

9. If a man recovers in debt upon contract, and does not take execution, yet he cannot have a new action of debt on the contract; for the contract is determined by the judgment on record. Br. Contract, pl. 39. cites 9 E. 4. 51. But if a man recovers debt upon an obligation, and does not take execution,

he may † have a new action of debt upon the obligation; for record shall not determine specialty without execution; per Danby and Needham. 9 E. 4. 50. b. 51. a. pl. 10. — Br. Barre, pl. 43. cites S. C. that it is no plea, that the plaintiff at another time recovered in account, debt, trespass, &c. if he does not say that he had execution; per Danby and Moyle; but Littleton and Choke contra. — Br. Judgment, pl. 47. cites 4 E. 4. 54. S. P. [but it should be 4 E. 4. 51. and there are not so many pages as 54.] And there it is said by Littleton, that they were all agreed that if a man recovers upon a simple contract, he shall not have a new action upon this contract, while the judgment is in force; for by the recovery the nature of the duty is changed. 9 E. 4. 51. a

If a man brings debt on an obligation, and is barred by judgment, he cannot have a new action so long as the judgment stands in force; and by the like reason, when he has had judgment in an action upon the same obligation, so long as this judgment stands in force he shall not have a new action. 6 Rec. a. Mich. 3 Jac. C. B. in Higgins's case.

† Contract, pl. 39. S. C. has the word (not.)

... plead a recovery of the land in question against the
... or one whose estate he hath, in the same or higher nature

ture of action, it is a good bar by many books. Heath's Max. 62.

Br. Joinder
in Action,
pl. 70. cites
S. C. &
S. P. per
cur. —
Br. Barre, pl. 83. cites S. C.

11. In *trespass upon the stat. of 5 R. 2. by 3 persons, a recovery of a 3d part of a moiety against one of them, and execution thereupon is a good bar.* Heath's Max. 62. cites 18 E. 4. 28. Bro. 70.

12. Debt upon an obligation with condition, and the obligee sues the obligation where the condition is not broken, by which he is barred. He shall never sue this obligation again; for once a bar is for ever. Br. Dette, pl. 174. cites 29 H. 8.

13. A. recovered an ejectment against B. Afterwards B. made a new lease for years to J. S. and A. ousted him. J. S. brought an ejectment, and A. pleaded the former recovery. This was held a good bar by all the justices except Windham and Periam, who held it no estoppel; for the conclusion shall be judgment si actio, and not judgment if he shall be answered; and though it be an action personal, and in nature of trespass, yet the judgment is quod habeat possessionem termini sui, during which time the judgment is in force; and it is not reasonable that he, against whom he recovered, should oust him. 4 Le. 77. pl. 163. Pasch. 28 Eliz. C. B. Spring v. Lawson.

[26]

4 Rep. 43.
pl. 7. S. C.
resolved ac-
cordingly.
—Le. 318.

14. Damages recovered in trespass of battery is a good plea in bar of *appeal of maihem* for the same battery. Mo. 268. pl. 419. Mich. 30 & 31 Eliz. Hudson v. Lee.

pl. 447. S. C. adjudged against the plaintiff, and cites it as adjudged accordingly, Pasch. 19 Eliz. in case of Rider v. Cobham; and says that the book which deceived the plaintiff was 22 E. 3. 82. where it was said by Thorpe, that notwithstanding recovery in appeal of maihem, yet he may after recover in trespass; but non dicit e contra. — S. C. cited 2 Mod. 319. and the court said that there can be no maihem without an assault; and though the appeal of maihem be of a higher nature than the assault, because it supposes quod felonice mayhemavit, yet the plaintiff can only recover damages in both. — See tit. Judgment (Q.) pl. 3. in the notes there.

15. A recovery in *assumpsit* against the father, upon a collateral promise, is a good bar in debt on bond against the son, who was the obligor. Cro. E. 283. pl. 5. Trin. 34 Eliz. B. R. Pyers v. Turner.

16. In account for malt, the defendant pleaded that the plaintiff had formerly brought trover and conversion for this and other malt against him, and that he was found guilty as to part, and not guilty as to other part, and damages assessed. Adjudged that this was no bar; for it might well be that he did not convert the malt, as the first action supposed, and yet he ought to account as this action supposes. Mo. 463. pl. 653. Hill. 36 Eliz. Mortimer v. Wingate.

Cro. E.
342. pl. 21.
May v.
Middleton,
S. C. &
S. P. ad-
judged ac-
cordingly

17. After action brought plaintiff attaches in London a debt due by another to defendant, and has judgment to recover; adjudged that this shall be pleaded in bar of the action for so much of the money. Mo. 598. pl. 820. Pasch. 36 Eliz. Moy v. Middleton.

against the opinion of Popham; because the plaintiff by his own act satisfies his own writ; but it was

was said, that a recovery is by act in law; which may help the case; but otherwise of a bare acceptance.

18. In debt against the defendant as administrator, he pleaded a recovery against him as executor, and that he has not assets ultra; and adjudged a good plea. Cro. E. 646. pl. 57. Mich. 40 & 41 Eliz. C. B. Smalpiece v. Smalpiece.

as administrator; resolved, that it was well pleadable in bar. Lev. 261. Hill. 20 & 21 Car. 2. B. R. Parker v. Amy, &c.——Sid. 404. pl. 11. Parker v. Masters, & al' S. C. adjudged accordingly.

In debt against a
as executor,
they pleaded
a judgment
against one

19. In debt on a bond, the defendant pleaded, that the plaintiff brought a former action in London upon the same bond; and upon non est factum pleaded, it was found not his deed, and the entry was, that the defendant recovered damages against the plaintiff, and should go sine die, but no judgment that the plaintiff should take nothing by his writ; therefore there was no judgment to bar him in another suit, for this was only a trial, and no judgment, and so the plea was held naught by the whole court. Brownl. 81. Pasch. 9 Jac. Level v. Hall.

Cro. J. 284.
pl. 5. S. C.
and the
court held
the plea in-
sufficient.
— S. C.
cited per
cur. 2
Mod. 295.
Hill. 29
Car. 2.

C. B. in case of Rose v. Standen,

20. In trespass for taking and driving away 100 sheep, judgment was given for the plaintiff and 2d. damages. Afterwards the plaintiff brought trover and conversion for the same 100 sheep. The defendant pleaded the former recovery in bar; but all the judges except Yelverton held, that the 2d. damages could not be intended to be given for the value of the sheep, but for the taking and driving only, and therefore that the trover and conversion well lay; and judgment was given for the plaintiff. Cro. C. 35. pl. 9. Pasch. 2 Car. C. B. Lacon v. Barnard.

Hutt 81.
Lacon v.
Barnard,
S. C. Gays,
Yelverton
at first hesi-
tavit, but
afterwards
agreed, and
judgment
for the
plaintiff.—

See tit. Actions (L. 5) pl. 30.

21. In case for falsely and maliciously procuring a commission of bankruptcy to issue out against the plaintiff, &c. by virtue whereof the defendant broke his shop, and took away his goods and shop-books, whereby he was discredited, and lost his trade, to his damage, &c. and the defendant pleads, that the plaintiff had before brought an action of trespass for breaking his shop, taking his goods, &c. and recovered damages against him in that action, this is no good plea; for this action is not brought for the same thing as the former was, that being for the trespass, and this for the loss of his credit, and consequently his trade, and in the action of trespass no damage could be recovered for the scandal upon which this action is grounded, and held that the action well lies. Sty. 3. 201. Hill. 21 Car. and Hill. 1649. Watfon v. Norbury.

[27]

22. Assumpsit against executor, he pleads a judgment in debt against him upon simple contract; though debt lies not in the case, the judgment is a bar of the assumpsit till it be reversed. 3 Lev. 181. cited per cur. as the case of Patmer v. Lawson.

Sid. 333.
pl. 17.
Pasch.
19 Car. 2.
B. R. the
S. C. &
S. P. re-

solved,———Ley. 200. S. C. adjudged for the defendant.

23. A

See title
Judgment
(M. a) pl. 1.

23. A judgment in an inferior court is pleadable in bar in a superior court; per Wilde J. of assise at Lancaster upon adjournment to his chambers at Serjeant's-Inn. 2 Lev. 93. Mich. 25 Car. 2. Atkinson v. Woodbarn.

24. The plaintiff brought an indebitatus assumpsit, and an *insimul computasset* for wares, whereas at that time no account was stated, and verdict for the defendant. Afterwards the plaintiff brought action of account, and the defendant pleaded the former action. But the court held the plea not good, and that if the plaintiff had recovered, it could not have been pleaded in bar to him; for if he *misconceives his action, and a verdict is against him, and then brings a proper action*, the defendant cannot plead that he was barred to bring such action by a former verdict; because where it is insufficient it shall not be pleaded in bar. 2 Mod. 294. Hill. 29 & 30 Car. 2. C. B. Rose v. Standen.

And Saunders said, that a recovery in trespass is a bar in detinue, account, or trover; for the plaintiff

25. Where the party being barred in one action shall be barred in another, is *intended* in an action of the same concernment, as a bar to one trespass is a bar in another for the same taking; but a bar in trespass is not a bar in detinue, or a bar in trover is not a bar in account. Arg. Skin. 48. in case of Foot v. Rastall.

And damages given to the value of the thing taken, and thereby the property is gone; but if damages are given not for the value, but for a collateral respect, as for *misusing*, &c. there bar in trespass is no bar in trover; and for this he cited 1 Car. 35. but in this case the jury find for the defendant, and so no property is altered; for the party may, notwithstanding he is barred in the action, *seize the goods* if he can come at them, quod sinit concessum per totam curiam. Skin. 57. S. C.

Raym. 472.
S. C. Mich.
34 Car. 2.
B. R. and
the S. P.
by Pemberton.

26. A difference was taken, per Pemberton Ch. J. that where the same evidence will maintain the one or the other action, there a bar in the one will be so in the other, as in Ferrar's case; but where it will not, it is otherwise. 2 Show. 213. Trin. 34 Car. 2. B. R. in case of Putt v. Rawstern.

27. Bar for want of averment of a life in one action is no bar in another, in which the continuance of the life is averred, it not being upon the matter, but upon the manner of the plea, arg. and to this the court inclined. 2 Lev. 210. Mich. 29 Car. 2. B. R. in case of Ingram v. Bray.

* [28]

Raym. 472.
Put v. Rawstern, S. C.
adjudged for the plaintiff in trover, because trover and trespass

28. Trover of goods; the defendant pleads in bar, that trespass was formerly brought against him for the same goods, and upon not guilty pleaded, a verdict for him; the plaintiff demurred; and by Pemberton * Ch. J. Jones, and Raymond, (Dolben hæsitante) judgment was given for the plaintiff. 2 Show. 211. pl. 219. Trin. 34 Car. 2. B. R. Putt v. Royston.

are sometimes actions of different natures; for trover will lie where trespass vi & armis will not; as if I deliver my goods to one to keep for me, and I afterwards demand them, and they are not delivered, here trover will lie, but not trespass; because here was no tortious taking; but where there is a wrongful taking and detaining the goods, the plaintiff may have either trespass or trover, and in such case judgment in one action is a bar to the other, and the rule is, viz. wheresoever the same evidence will maintain both the actions, there the recovery or judgment in the one, may be pleaded in bar to the other, and this will not clash with Ferrar's case; for here it is to be presumed that the plaintiff, in the first action, had mistaken his action, by bringing trespass vi & armis, whereas he had no evidence

to prove a wrongful taking, but only a demand and refusal, and for that reason the verdict passed against him in the action of trespass, and therefore he was obliged to begin again in trover. — 2 Mod. 318. S. C. and the court were of opinion, that trover will lie where a trespass will not, and if the plaintiff has mistaken his action, that will be no bar to him. — 3 Mod. 1. S. C. adjudged by 3 judges, for the plaintiff. — Pollexf. 634. to 645. S. C. argued by the reporter, and says, judgment was given for the plaintiff in the action; but a writ of error intended. — Skin. 48. pl. 2. Foot v. Refal, S. C. adjournatur; but *ibid.* 57. pl. 1. adjudged, nisi. — But in the case of Lechmere v. Toplady, Show. 146. Hill. 1 W & M. it was held, that judgment in trespass on a special verdict is a good plea in bar to trover brought for the same goods. — See *tit. Actions* (L. 5) pl. 35, 36.

29. *T. brought trespass of assault and battery in B. R. against S. to which S. pleaded son assault demesne, and found for the plaintiff. Afterwards S. brought trespass of assault and battery against T. in C. B. and T. pleaded this verdict and judgment in bar; and the court would not suffer this action to proceed. Cited Skin. 58. Mich. 34 Car. 2. by Pollexfen, Arg. as the case of Turbervill v. Savage.*

30. If there be two obligees, and debt is brought against one, and he pleads *non est factum*, and found for the defendant, an action may be brought against the other; but if he pleads *conditions performed*, and found for him, it is otherwise. Skin. 58. Arg. pl. 1. Mich. 34 Car. 2. B. R. in case of Foot v. Rastall.

31. The plaintiff declared in an action of covenant, that whereas the defendant had covenanted and agreed with the plaintiff not to release to J. S. without the plaintiff's consent, that notwithstanding he had released to him, and this declaration being ill, judgment was for the defendant; and after the plaintiff brought another action, and the defendant pleaded this in bar; and upon a demurrer, the counsel for the defendant urged 6 Rep. 7. and Dyer, and the counsel for the other side cited Mod. Rep. 207. The court took a difference between a bar and demurrer to the declaration, and a judgment upon a demurrer to the plea, or upon a verdict or confession; for in the case of a demurrer to the declaration, the right was never tried. Skin. 120. pl. 15. Trin. 35 Car. 2. B. R. Coppin and Steymaker.

The reason why the first declaration is naught, is, because he says the defendant released to J. S. and fails not without the plaintiff's consent, and so for aught appears it was with it, and then it is no

breach of covenant. Skin. 120. Coppin v. Steymaker.

32. In *replevin* the defendant avowed, and there was a demurrer to the avowry, &c. and after a new *replevin* was brought, and this judgment pleaded in bar, and they could never get over it. Cited by Pollexfen, as a case wherein he was of counsel; and yet he said an avowry is like to a declaration. Skin. 120. Coppin and Steymaker.

33. Recovery in a former action by A. and B. for throwing down their house, and spoiling goods; upon which was a verdict, and 140l. damages, is a good bar to an action of trespass brought after by A. alone for damages, little varying from what was alleged in the former action, as loss of trade, &c. 3 Lev. 179. Trin. 36 Car. 2. C. B. Barwell v. Kensley.

34. Recovery in trover, or battery against an insolvent person, is
VOL. IV. D a bar

a bar to sue any other of the parties. Arg. Show. 168. Trin. 2 W. & M.

* 35. Debt was brought upon a bond for performance of covenants. The defendant pleaded in bar, that for all the breaches, till such a time, he had brought covenant and recovered damages, and that there was no breach since that time; and demurrer, and judgment for the plaintiff; for by the very plea the bond was forfeited. 12 Mod. 321. Mich. 11 W. 3. Pierce v. Hutchinson.

1 Salk. 11.
pl. 5. Fetter
v. Veal, S.C.
adjudged ac-
cordingly.

36. After recovery of damages in assault, battery, &c. no action will lie for consequential damages; as where, after such recovery, a piece of the man's skull came out. 12 Mod. 542. Trin. 13 W. 3. Fitter v. Veal.

37. Recovery in trespass and battery is a good bar in *maibem*; per cur. 12 Mod. 543. Trin. 13 W. 3. Fitter v. Veal.

38. If A. wound B. and he thereof die within the year, through the unskillfulness of surgeons, yet it is felony in A. per Holt Ch. J. 12 Mod. 544. Trin. 13 W. 3. in case of Fitter v. Veal.

39. And if A. brings an action for words actionable in themselves, and recover damages: and after, by reason of the words, she loses a husband, yet no action will lie after for the special damage; per Holt Ch. J. 12 Mod. 544. Trin. 13 W. 3.

40. So if the words be actionable for special damage, which the party has suffered by reason of them, and for that damages are recovered, and after the party has another special damage; per Holt Ch. J. 12 Mod. 544. Trin. 13 W. 3.

1 Salk. 11.
pl. 5. S. P.
and by Holt
Ch. J. in
trespass the
grievousness
or conse-
quence of
the battery
is not the
ground of
the action,
but the
measure of
the dama-
ges, which
the jury must

41. An action of trespass for battery and wounding is not like the case of a nuisance in erecting a pent-house, whereby the rain falls in upon my house or garden; or stopping my lights, wherein I shall recover damages for every new hurt infinitum; for, first, the battery is a transitory act, and the nuisance is a continued one as long as it lasts; therefore damages cannot be recovered for it at once. 2dly, Every new rain that falls, or every light that is stopt, is a new nuisance; but every new ill consequence of the battery is not any new wrong of the defendant. Et per tot. cur. jud' pro defendant. 12 Mod. 544. Trin. 13 W. 3. Fitter v. Veal.

the jury must be supposed to have considered at the trial; and judgment for the de-

(B. 2) Judgment in one Action, where a Bar in another Action, though brought by or against another Person, it being for the same Thing.

And though
he has that
one in exe-
cution, he

1. TWO are bound, *conjunctim & divisim*, and the obligee recovers against one of them, and does not sue execution, yet he may have a new action against the other if he will, so the nature,

nature of the deed is not changed by this recovery, &c. 9 E. 4. 51. a. pl. 10. per Pigot. may implead the other, and take him in execution also, because execution is not a satisfaction; but if the one satisfies the plaintiff, he shall not have execution after. Br. Executions, pl. 132. cites 29 H. 8. per tot. cur. in C. B.

In case of an obligation against two, each of them is chargeable and liable to the entire debt, and therefore a recovery against the one is no bar against the other till satisfaction; per cur. Cro. J. 74. in pl. 3. Trin. 3 Jac. B. R. — Yelv. 67. S. P. obiter, cites 4 H. 7. 22. — See 5 Rep. 86. b. Plumfield's case. — As to him against whom the judgment is, it is become a record; but as to the other, it continues a writing as it was before; per cur. 6 Rep. 4c. b. — The nature of the obligation is not changed against the other, but that the obligee may have action of debt upon the same obligation against the other obligor, and he may plead non est factum, notwithstanding the judgment against the other. 6 Rep. 45. a. 46. a. Mich. 3 Jac. C. B. in Higgins's case.

[30]

2. If goods of the bailor are taken, and he recovers damages, the bailor shall not have action after. Br. Trespas, pl. 442. cites 20 H. 7. 5. So if the bailor recovers first. Br. Ibid.

3. In trespass for battery of his servant, the master may recover for the services, and the servant for the battery. Br. Trespas, pl. 442. cites 20 H. 7. 5.

4. It seems that if termor recovers in ejectment, and re-enters, the lessor shall not have assise. Br. Trespas, pl. 442. cites 20 H. 7. 5.

5. So of tenant by statute-merchant, tenant by elegit, &c. Br. Trespas, pl. 442. cites 20 H. 7. 5.

6. In trover and conversion of certain plate, the defendant pleaded that at another time the plaintiff had brought his action against J. S. for the same plate, supposing the conversion to have been by him, and in that action he had recovered 20 l. damages, and had J. S. in execution for those damages. Resolved a good bar; and it was said, if one have cause of action against two, and obtains a judgment against one of them, he shall not have any remedy against the other; and judgment per tot. cur. for the defendant. Cro. J. 73, 74. pl. 3. Trin. 3 Jac. B. R. Brown v. Wootton. Mo. 762. pl. 1600. S. C. and the plea adjudged good. — Yelv. 67. Broome v. Wootton, S. C. and a diversity was taken by the court between a thing certain and uncertain; as where two are bound in 100 l. to J. S. jointly and severally, a recovery and execution against one is no bar against the other; for execution is no satisfaction of the 100 l. demanded. But where trespass is done by two, which rests only in damages, and the plaintiff recovers against the one, and has execution, there it is a good bar against the other. And it was further agreed, that the very judgment was a sufficient bar, quia transit in rem judicatam; and the thing uncertain is now by the judgment made certain, and thereby altered and changed into a thing of another nature than it was at first, and therefore he cannot resort to demand the uncertainty again, the first judgment being a bar to it. — The same law of a battery against several, and recovery had against one. Ibid. 69. cites it as agreed the same term, in case of Hickman v. Poymes.

(C) Action upon the Case, Bar [to another Action on the Case.]

[1.] If the defendant be found not guilty in an action upon the case for words, yet this verdict, if no judgment be given thereupon, shall be no bar of another action upon the case for the same. 2 Brownl. 122. S. C. says it was agreed by

all, that judgment should be

same words. Mich. 9 Jac. B. between JACOB AND SOWGATE, per curiam.]

given for the defendant, nisi.——But Brownl. 11. Jacob v. Songate, Trin. 9 Jac. S. C. agrees with Roll supra, that it was adjudged no bar, because no judgment was given in the first action, and so judgment entered for the plaintiff.

[2. In an action upon the case, upon a promise, if the plaintiff declares, that in consideration that he demised to the defendant a house for a year for certain rent, and delivered the key thereof to him, the defendant did assume, at the end of the year, either to deliver the possession or give 5l. to the plaintiff, and for the non-delivery of the possession or payment of 5l. the action is brought; it is no plea in bar of this action for the defendant to say, that the plaintiff had nothing in the house at the time of the demise, for if it should be admitted, yet the delivery of the key and possession is a sufficient consideration to bind the defendant, either to re-deliver the possession, or give 5l. Mich. 13 Car. B. R. between PAGE AND LOWNES, adjudged upon demurrer.]

[31.] (D) In what Cases a Discharge pro Tempore shall be a Bar. And how.

S. P. and shall not have scire facias; for by the judgment the record is deter-

mined per Martin; quod tot. cur. concessit. But Brooke says quare inde; for it seems that debt does not lie after the plaintiff is once barred. Br. Executor, pl. 85; cites 4 H. 6. 4.—S. P. Br. Dette, pl. 105; cites S. C.

1. *IN debt against executors who plead plene administravit*, and it is found for them, the plaintiff shall be barred, and after goods came to their hands by recovery or otherwise, the plaintiff shall have another action of debt de novo. Br. Dette, pl. 92. cites 19 H. 6. 37. per Markham.

2. *So in debt against the heir, who pleads riens per descent*, and after assets comes to him, in a new action he shall be charged, and the first matter no bar. Br. Dette, pl. 92. cites 19 H. 6. 37. per Markham.

3. Where a man grants to his debtor that he shall not be sued before Michaelmas, this is a good bar for ever. Br. Grants, pl. 58. cites 21 H. 7. 23.

4. Grant that a man shall not be distrained for three years, or that he shall not be impeached of waste; these are good bars, and the party shall not be put to his action of covenant. Br. Grants, pl. 58. cites 21 H. 7. 23.

(E) In what Cases a Man may be restored to his Action.

1. **I** F a man who has title of action of assise of mortdancestor disseises the tenant, and the tenant recovers by assise, the other is restored to his assise of mortdancestor; for the estate and last seisin is now defeated. Br. Restore, pl. 3. cites 5 Aff. 1.

2. A man died seised, and the land descended to W. N. and after J. S. abated and died seised, and his heir entered, and the heir of W. N. entered upon him, against whom the heir of J. S. brought assise and recovered; there the heir of W. N. may have assise of mortdancestor, and confess and avoid the recovery in assise of novel disseisin: for he is restored to the first action. Br. Restore, pl. 4. cites 10 Aff. 16. Br. Mort-
dancestor,
pl. 4. cites
S. C.

3. In assise the plaintiff was outlawed in action of trespass after the disseisin, and after obtained charter of pardon, and brought assise, and the defendant pleaded the outlawry in trespass in bar, and the plaintiff shewed the charter of pardon; and by this the assise lies well of the first disseisin, without title after the outlawry; for by the charter of pardon the plaintiff is restored to his first action, viz. the assise, without other seisin or entry after. Br. Restore, pl. 7. cites 13 Aff. 5.

4. A man recovered by scire facias upon a fine, and made feoffment upon condition, and re-entered for the condition broken, and the tenant reversed the first judgment, and execution thereupon by writ of disceit, and entered; and the first plaintiff brought another scire facias to execute the same fine, and the issue taken if the feoffment was single, or upon condition. Br. Restore, pl. 2. cites 38 E. 3. 16. Br. Sci. Fa.
pl. 88.
cites S. C.

5. Dower of the possession of the baron of the demandant. The tenant came and said that fine was levied between J. & E. and the tenant, and that the same tenant brought scire facias upon the same fine against the same feme now demandant; and she said as to parcel, that she held of the dower of the same baron, and of whose dowerment she now holds of the assignment of W. C. and prayed aid of him; and to the rest, that she held for term of life of the demise of this same W. C. and prayed aid of him; upon which came the prayee, and they pleaded feoffment of the baron, to whom the remainder of the fee-simple by the same fine was intailed, to whom the now tenant and then plaintiff in the scire facias said that riens passa by the deed; and after the prayee made default, and the now demandant, then tenant, maintained the same plea which was found against the feme now demandant; by which the now tenant, then plaintiff in the scire facias, had execution; judgment if against this recovery, against herself, she shall be received to demand dower, and the demandant demurred, inasmuch as this recovery affirms the possession of the baron; for by his pretence the feme, by such recovery, is restored to her first action; but the best opinion was e contra, and that when she is lawfully in, in dower, and loses by recovery,

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that in this case she has no remedy but by writ of error or attain, or writ of right, and she upon this estate cannot have writ of right; and it was said, that it was folly in the feme that she had not said that she was in dower, ready to be attendant to whom the court should award, and upon such plea she shall hold the possession, and the reversion shall go to him who has right to it. Per Belk. but when one is in by tort, as by disseisin upon a descent to the heir of the disseisor, or by entry upon a discontinuance, and the heir of the disseisee or the discontinuee recovers, there the disseisor, or the feme, or his heir, shall have in the one case writ of entry, and in the other *cui in vita*; contra where he who is in by rightful title loses by recovery, he has no remedy but by attain, writ of error, or writ of right. But per Clopton, this is where the issue is upon the entry; but if the issue be upon a release, or other point which goes to the tenancy or to the right, there, if this be found against him, he shall not be restored to the first action. Note the diversity by him; but quare of his opinion thereof. And per Wich. where land is recovered against the baron upon dilatory, as *nontenure*, *misnomer of the will*, &c. there the feme shall have dower, and may falsify the recovery; for this does not falsify the possession of the baron; but contra it seems upon recovery upon dilatory against the feme herself, being in in dower. Note the diversity. Br. Restore, pl. 1. cites 50 E. 3. 7.

Br. Sci. Fa.
pl. 60. cites
S. C.

6. An infant had title by fine, executory and entry, and he upon whom he entered ousted him, and the infant brought assise, and the defendant pleaded to the assise, and the jury found for the defendant in the assise; so that the infant plaintiff was barred, by reason that there was a divorce which was not pleaded by the infant, by which the plaintiff was barred of the assise; and yet he after brought scire facias to execute the fine, and the tenant in the assise pleaded record of the assise, by which the now plaintiff was barred in the assise, and yet the plaintiff recovered, and was not barred by the first judgment, by reason that he was an infant at the time of the judgment, and this notwithstanding the fine was executed in the infant by his first entry. Quod mirum. Br. Restore, pl. 6. cites 7 H. 4. 22.

7. In some case the original may be revived by writ of error, and in some case the action; as where an exception to the writ is awarded good, by which the writ abates, and after the other reverses it by error, the original is revived, and he shall have writ of resummons; but if an ill bar be adjudged good, and the demandant reverses it by writ of error, he is restored to his action. Brooke says, see elsewhere if in such case the court will not award that the demandant recover; and says it seems they will. Br. Error, pl. 7. cites 9 H. 6. 38.

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8. If a man intrudes after the death of my tenant for life, and I bring writ of intrusion, and recover, and after make feoffment to a stranger, and after the intruder reverses the first judgment by writ of deceit, error, or attain, there I am without remedy, and am not restored to my first action, and writ of right does not lie; for my feoffment gives my right to the feoffee, who cannot re-vest

revest it in me by the reversal of the recovery. Contra, if he had not made feoffment. Br. Restore, pl. 8. cites 9 H. 7. 24.

9. If a man enters where his entry is not lawful, as the heir in tail after his discontinuance, or the heir of a feme, or the feme herself after discontinuance, and the other upon whom he enters recovers against him; there he, his heir in tail, or the feme, or her heir, is restored to their first action of formedon, or cui in vita. Br. Restore, pl. 5. cites 23 H. 8.

10. But if such who enters where his entry is not lawful, makes feoffment, and the other upon whom he enters recovers; now the first action is not restored to the issue in tail, or to the feme, or to her heirs, by reason of the feoffment, which extinguishes right and action. Ibid.

11. But if such who so enters, makes feoffment upon condition, and for the condition broken re-enters, before that he upon whom he enters has recovered, and he recovers after the re-entry made by the condition; there he who made the feoffment upon condition, is restored to his first action; for the entry by condition extinguishes his feoffment. Ibid.

(F) Bar. Good to a common Intent.

1. If a bar be good to common intent, it sufficeth. Br. Barre, Heath's Max. 53. cites 3. C. 1. —Br. Barre, pl. 41. cites 9 Ed. 4. 12. by Moyle.

pl. 87. cites 21 E. 4. 83. that a plea in bar by matter of fact, is good to a common intent. —The defendant in maintenance did plead, that the party was his servant, and that he did retain A. to be his counsel, and for the reason aforesaid it shall be intended, that he retained him with his servant's money, and not with his own money; quod nota. Heath's Max. 54. cites 21 H. 6. 1.

A bar may be good to a common intent, though not to every intent, as if debt be brought against five executors, and three of them make default, and two appear and plead in bar a recovery had against them two of 300l. and that they have nothing in their hands over and above that sum. If this bar should be taken strongest against them, it should be intended that they might have avoated the first suit, because the other three were not named, and so the recovery not duly had against them; but according to the rule, the bar is good. For that by common intendment it will be supposed that the two others did only administer, and so the action well considered, rather than to imagine that they would have lost the benefit and advantage of abating the first writ. Heath's Max. 54. cites Touchstone of Pledents, tit. Pleas and Pleadings, fol. 192. reg. 7.

So if a bar have matter of substance in it, and be good to common intent, it is sufficient, albeit it be not good to every special intent; as where one sues as executor, and the defendant saith, that the testator made the plaintiff and one J. S. executors, and does not say after this, that he did not make the plaintiff executor, yet this may be sufficient. Heath's Max. 55. cites 3 H. 7. 2. Plowed. 26. by Cooke Serj. Arg. Pl. C. 26. a. cites 33 H. 6. [but I do not observe S. P. as 3 H. 7. 2.]

So in trespass where the defendant pleads that the place is his freehold, this is good, yet the plaintiff may have a particular estate. Heath's Max. 55. —Pl. C. 26. a. cites Trin. 10 H. 7. 25. S. P.

So upon an obligation to perform covenants, the defendant alledgeth two covenants, and saith he hath performed them, and doth not say there are no more covenants in the deed to be by him performed, yet it is good; for it shall be intended there are no more for him to perform. Heath's Max. 55. —Pl. C. 26. a. cites 6 E. 4. 1. S. P. and Fitch. Barre 89. and Br. Condition, pl. 144. S. C.

* S. P. Br. 2. But if the defendant pleads in bar a record or * estoppel, that
Barre, pl. must be certain and good to every intent. Heath's Max. 54.
87. cites
21 E. 4. cites 22 E. 4. 83.
83. that an
estoppel ought to be good to every intent, per Briggs.

3. If a lease be made to A. and B. for life, the remainder to C. and if C. shall die during the life of A. or B. then that it shall remain to E. for life, si ipse vellet esse residens, &c. and E. (being defendant) pleads his entry after the death of A. and B. and C. and doth not say when they died, yet held to be good in a plea in bar: for if it be a condition, it shall be intended that the defendant did enter as soon as his title accrued; and if the case be otherwise in truth, than by common intendment it is taken to be, the plaintiff must set it forth in his pleading, as in a *formedon in descender*, if the tenant pleads in bar a release of the demandant without warranty, it is good; and yet the release might be made by the demandant in the life of his father, and then it is no bar to the issue. Heath's Max. 56, 57. cites Plowd. 32, 33. [Pasch. 4 E. 6. Colthirst v. Bejushin.]

So if one
saith he
was lord of
a manor,
and entered
for an alien-
ation in
mortmain,

4. But no substantial part of a bar may be omitted. As where one is bound to do a thing between such and such a time, and the defendant saith that he did it, or did it before the day, this is not sufficient, but he must shew that he did it such a day within those times. Heath's Max. 55.

and do not shew that he did it within the year, this shall not be intended unless it be shewed. Heath's Max. 55. — Pl. C. 27. b. cites Hill. 3 H. 7. 2. b. — S. P. by Doderidge J. Lat. 171. & ibid. 172. Jones J. agreed. — Yet per Plowdon 28. if one pleads a *seoffment* in bar, it shall be allowed as good, albeit it might be an infant, or per *durest*, &c. unless it be shewed on the other side. Heath's Max. 55. — Pl. C. 27. b. S. P. — And if the lessor covenants with the lessee, that if he be ousted within the term, that he shall have as much other land, he must shew that he was ousted on such a day in certain within the term. Heath's Max. 55. — Pl. C. 27. b. S. P. Arg. — So to plead in bar, that J. S. died seized, and R. S. entered as son and heir to him; this is good, though he say not that he was his heir, for that shall be intended, and the best shall be taken for the defendant. Heath's Max. 56. — Pl. C. 28. a. — So in an *assise*, if the tenant pleads in bar a *descent* to the plaintiff and two others, and that he hath the estate of one of them; it is good, yet he might have it by *disseisin*; but it shall be taken in the best sense, that he had it lawfully. Heath's Max. 56. — Pl. C. 28. b. S. P. — So where the ancestor is tenant *per ancestor* vie, and the heir pleads that he entered as heir to him, and says not that he entered first after his death, for *occupanti conceditur*. Heath's Max. 56. — Pl. C. 28. b. cites Fitzh. Barre 73. & Br. Assise 271. in 27 Ass. 31.

5. Debt against an executor upon a bond of the testator. The defendant pleaded a statute acknowledged by the testator, &c. and averred that he has not, nor at the day of the bill brought, he had not any goods which were the testator's *tempore mortis sue*, in his hands to be administered, unless to satisfy the said statute; and upon demurrer to this plea, it was objected that it was ill, because the defendant might have goods liable to debts, though they were not the testator's goods *tempore mortis sue*; but all the court except Williams J. held it well, the bar being good to a common intent, and it shall not be intended that he had such assets, being special assets, unless it was specially shewed; and denied the 7 H. 4. 39. which was cited to be good law in that point,

Baron and Feme.

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point, and judgment for the plaintiff. Cro. J. 131. pl. 4. Mich. 4 Jac. B. R. *Gewen v. Roll*.

6. Though a bar shall be taken good by a common intent, yet when the bar *depends upon circumstance*, there in pleading the matter he *must shew it to be within the circumstance*. Per Doderidge J. Lat. 171. Trin. 2 Car.

7. Debt upon *bond for quiet enjoyment* from the time, &c. The defendant *pleaded, that after the making the said bond to the day of the bill the plaintiff had enjoyed the lands*; and upon demurrer to this plea it was objected, that the defendant does *not say, a die confectionis scripti obligatorii & semper post confectionem*, &c. sed non allocatur; for the bar is good to a common intent, and it shall be intended that he always enjoyed it, unless the contrary is shewn. Cro. C. 141. pl. 6. Trin. 6 Car. B. R. *Harlow v. Wright*.

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8. The *reason why* a bar is good to a common intent, is because it is to *excuse from a charge*. But a replication must have a general certainty, because it is to destroy the excuse of the defendant, which is always received favourably. Per Holt Ch. J. 12 Mod. 665. Hill. 13 W. 3.

Heath's
Max. 57-
S. P.

For more of Bar in general, see Abatement, Actions, Judgment, and the pleadings under the several other titles.

Baron and Feme.

Fol. 340.

(A) Who shall be said to be Baron and Feme.

[1.] If a man *espouses his mother*, they are baron and feme till it be defeated. 9 H. 6. 34.]

For when the bones and espousals are

made in facie ecclesie, this is sufficient to us, and whether it be lawful matrimony or not, is nothing to us, per Paston; but per Cavendish, notwithstanding the celebration, the court shall take notice whether the espousals are lawful or not. Ibid.

[2. If a woman takes a 2d husband, living the first husband, this is void marriage by our law, as by the spiritual law. Contra 9 H. 6. 34.]

See tit. Bastard (A. 2) pl. 1. & (F) pl. 1. S. P.

S. P. Arg. Mo. 226. ——— Adjudged that where the husband took a second wife, the marriage was void ab initio, and she was always sole, and there needed no sentence of divorce, and such divorce is only declaratory. Cro. E. 8, 857. pl. 25. Mich. 43 & 44 Elis. C. B. *Riddlefen v. Wogan*.

[2. If

Br. Bastard, dy, pl. 23. cites S. C. [3. If a man baptizes the cousin of A. S. and after marries with A. S. they are baron and feme till a divorce. 39 Ed. 3. 31. b.] [This is seems was looked upon as a spiritual affinity, so as their intermarriage was prohibited, and as I think, I remember Sir Paul Rycart mentions it to be still observed in the eastern churches.] — See tit. Bastardy, (A. 2) pl. 4. and the notes there.

Br. Bastard, dy, pl. 23. cites S. C. — See tit. Bastard, (A. 2) pl. 3. S. C. [4. So if a man takes his sister to wife, they are baron and feme till a divorce. 39 Ed. 3. 31. b.]

* Fitzh. Curone, pl. 36. cites Mich 11 H. 4. 13. S. C. not baron and feme; because there is not any consent, and cannot be a marriage without a consent. Dubitatur * 11 H. 4. 14. † Kelw. 52. † 19 H. 7.] [5. If a man takes A. S. to wife by duress, though the marriage be solemnized in facie ecclesiæ, yet it is merely void, and they are not baron and feme; because there is not any consent, and cannot be a marriage without a consent. Dubitatur * 11 H. 4. 14. † 19 H. 7.]

Trin 19 H. 7. Keble v. Vernon. — D 13 a. Marg. pl. 61 says, that Noy attorney general held, that marriage by duress was good, contrary to the opinion of Frowike, Cro. [Kelw.] 52. because otherwise upon such allegation, divorces will be frequent to satisfy men's lusts, and cites Fitzh. Attachment sur Prohibition 8 and 11 H. 4. 13. and Swinb. 241. — Marriage by force and duress of the feme is void, and trespass thereof well lies; per Windham J. and cites it as by Babington, in L. 5 E. 4. 61. b. — 2 Inst. 687. S. P. cites 11 H. 4. 14. Rot. Parl. 17 H. 6. Numb. 15. Isabel (Lady) Butler's case. — See 7 Mod. 102. Mich. 1 Ann. B. R. the Queen v. Swanston & al'. — See tit. Marriage (H. a) per totum.

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[6. If a woman, after carnal knowledge of her husband, enters into religion without the consent of her husband, and the husband after takes another wife, this is void; because he may deraign his wife. 18 H. 6. 33.]

[7. So the second marriage would be void, though the wife had entered into religion by the assent of the baron; because the baron, by his assent, had in a manner vowed chastity.]

Bastard (A. 2) pl. 8. S. C. — S. C. cited Sid. 112. [8. If an idiot a nativitate takes a wife, they are baron and feme in law, and their issue legitimate, for he may consent to a marriage. Trin. 3 Jac. B. R. between STILL AND WEST, adjudged upon a special verdict.]

* Br. Verdicht, pl. 21. cites S. C. — Br. Bastardy, pl. 25. cites S. C. quod nota bene, quia nemo negavit. — Fitzh. Bastardy, pl. 33. [9. If a man takes the order of a deacon, and after takes wife, this marriage is not void; for the issue is no bastard. * 21 H. 7. 39. 19 H. 7. Bastardy 33. adjudged by advice in the exchequer chamber.]

[10. So if a priest takes a wife, this not void, but they are baron and feme. * 21 H. 7. 39. 19 H. 7. Bastardy 33. per Frowike.]

[11. So if a nun takes husband, it is not void, but voidable, contra ibidem, per Vavisor.]

pl. 33. cites S. C. — 2 Inst. 687. Ld. Coke says, that it appears in our books, that if a deacon or secular priest had taken wife, the marriage was not void, but voidable causa professionis; and if either party had died before divorce, their issue had been legitimate, and should have inherited; for that deacons and priests within England were not votaries, that is, had not vowed chastity; but if a monk or a nun had married before the statute of 32 H. 8. cap. 38. and of 2 E. 6. cap. 21. and this act of 5 E. 6. the marriage had been (as it was then holden) merely void; for that they had taken a vow of chastity, as it appeareth by our books in 5 E. 2. tit. Non Habitability 26. 19 H. 7. tit. Bastard 33. 21 H. 7. 39. b. for avoiding of which scruple, the said acts of 32 H. 8. 2 E. 6. and 5 E. 6. were made.

[12. If a man within the age of 14, takes a wife above the age of 12, this is a marriage, and they are baron and feme de facto, so that the baron may have trespass de muliere abducta cum bonis viri. Trin. 12 Jac. B. between BRADSHAW AND FLETCHER, per curiam.]

The age of a feme for consent to marriage is 12 years. Br. Age, pl. 73, cites lib. B. fol. 117. — Br. Gard, pl. 7. cites 35 H. 6. 40. S. P. — Mo. 741. Arg. cites S. C. & S. P. by Wankford. — 2 Inst. 90. S. P. — Co. Litt. 79. a. S. P. — Fr. Age, pl. 41. cites 3 E. 4. 7. but says, that those of the spiritual law say, that it was not so then, unless at that time she be apta viro.

[13. If a man marries a woman that is within the age of 12, and after the woman at the age of 11 years disagrees to the marriage, this disagreement is void, it being within the age of consent, and so they continue baron and feme notwithstanding the disagreement. Tr. 24 Eliz. : adjudged, cited M. 41 & 42 El. B. R. by Coke. Co. Litt. 79. M. 41, 42 Eliz. B. R. per curiam, between BABINGTON AND WARNER.]

Mo. 575. pl. 794. Warner v. Babington, S. C. the question was, if she ought to agree or disagree

ante annos nobiles, or what time the law has appointed for it; Popham said, that if she marries another baron infra annos nobiles, this shall be a disagreement; to which Fenner agreed; & adjournatur. — See pl. 16.

[14. If a man marries a woman that is within the age of 12 years, and after the woman at 11 years of age disagrees to the marriage, and after the husband takes another wife, and has issue by her, this is a bastard; for the first marriage continues, notwithstanding the disagreement of the woman, for she cannot disagree within the age of 12 years, and so her disagreement void. Trin. 35 Eliz. B. R. adjudged, cited M. 41, 42 Eliz. B. R. by Coke. Quære.]

Fol. 34r. [37]

[15. If a man of the age of 14 takes a woman of the age of 10, the baron, when the feme comes to the age of 12, may disagree as well as the feme; because in contracts of matrimony each ought to be bound, and equal election given to both. Co. Litt. 79. [b.]

[16. If a man marries a woman that is within the age of 12 years, and after the feme, within the age of consent, disagrees to the marriage, and after the age of 12 years marries another, now the first marriage is absolutely dissolved, so that he may take another wife; for though the disagreement within the age of consent was not sufficient, yet her taking another husband after the age of consent, affirms the disagreement, and so the marriage avoided ab initio. M. 41, 42 El. B. R. between BABINGTON AND WARNER, adjudged in a writ of error upon a judgment given in banco, where the same point was also adjudged.]

Mo. 575. pl. 794. Warner v. Babington, S. C. in debt upon bond the defendant pleaded, that the feme had another baron in full life; the plaintiffs replied, that

the feme ad annos nobiles disagreed; and upon demurrer it was adjudged for the plaintiffs, because after the age of consent she always cohabited with the second baron; and so a judgment in C. B. was affirmed in B. R. — D. 13. a. Marg. pl. 61 cites S. C. and the second marriage adjudged good, though the feme disagreed within age, and says, that so was the opinion of Noy attorney-general, and Harrison reader of Lincoln's-Inn, 1632; and Noy's reason was, that the church, providing against change of lust, had prohibited divorces, but in this case, under the age of 12 years, there was no such mischief.

[17. If

[17. If an *infant* within the age of consent, as of the age of 10 years, takes *A. S. to wife*, and after, when he comes to the age of 14, they both being present together, *severally disavow* to the said marriage, which disavowment is put in writing, and the said infant puts his hand thereto, and after they agree again, and live together as man and wife, this is a good agreement, and so the marriage continues; for the said disavowment by parol is not such a binding disavowment, but that they may well after agree to the first marriage without any new marriage, for affection may increase. P. 7 Jac. B. between LEE AND ASHTON., adjudged per curiam.]

[18. But *otherwise* it had been if the *disavowment* had been before the ordinary; for there they could not ever agree again to make it a good marriage. Tr. 12 Jac. B. per Warburton.]

[19. If a man within the age of 14 takes a wife of full age, and after brings a writ *de muliere abducta cum bonis viri*, and after comes to the age of 14, if after he makes any continuation of the action, this shall be an agreement to the marriage, so that it cannot after be defeated. Trin. 12 Jac. B. per curiam.]

[20. If baron and feme are divorced *causa adulterii*, yet they continue baron and feme; for the divorce is but a *mensa & thoro*, & *matrimonii obsequiis*. My Reports, 14 Jac. * MOTAM AND MOTAM, 44 El. † STEVENS AGAINST TOTTE, Trin. 2 Jac. B. Rot. 1815. between † STOWEL AND WIKES, adjudged; and that she shall not lose her dower by this divorce. Quod vide Co. Litt. 33. b.]

* 3 Bulst.
264. Mot-
teram v.
Mottoram,
S. C. &
S. P. ad-
mitted —
Roll. Rep.
426. pl.
39. S. C.
& S. P.
admitted.

† See (F) pl. 3. S. C. — S. C. cited by Doderidge J. 3. Bulst. 264. — S. C. cited Arg. Roll. Rep. 426. † Noy 108. Powell v. Weekes, S. C. & S. P. resolved. — Godb. 145. pl. 182. Lady Stowell's case, S. C. adjudged. — S. C. cited Cro. C. 463. — S. P. declared per tot. cur. in the star-chamber accordingly; and archbishop Whitgift said, that he had called to him at Lambeth the most sage divines and civilians, who all agreed to the same. Mo. 683. pl. 942. Hill. 44 Eliz. Rye v. Fuliambe. — Noy 100. Rye v. Fullcumbe, S. C. & S. P. accordingly. — S. P. Mar. 101. pl. 173. Trin. 17 Car. B. R. Williams's case; resolved, without argument by Bramston Ch. J. and Heath J. absentibus aliis, that it is within the statute of 1 Jac. cap. 11. and Heath said that, by the law of holy church, the parties divorced *causa adulterii*, might marry; but pars rea not without licence.

[38]

* See Bastard
(B) pl. 18.
— See tit.
Marriage
(E. 2) (F)
(F. 2)

[21. If a man and a woman are married by a priest in a place which is not a church or chapel, and without any solemnity of the celebration of mass, yet it is a good marriage, and they are baron and feme. Contra * 10 E. 4. B. Rot. 23. adjudged; for their issue adjudged a bastard.]

22. Marriage by a *meer layman*, minister of a separate congregation, will not intitle the man to be administrator to the woman, notwithstanding cohabitation for several years as man and wife. Affirmed on appeal to the delegates. 1 Salk. 119. 9 Ann. Haydon & Ux v. Gould.

(C) What Persons shall be said Baron and Feme.
In respect of their Age.

Fol. 342.

N. B. Roll.

has no letter (B)

[1. BY the law of England the age of consent to a marriage, for a male, is the age of 14, so that he cannot marry himself before this age, to make a compleat and perfect marriage, but then he may, Lit. 22. b. * 35 H. 6. 41. b. For then he is puber, and such that he may engender.]

Sec (A) pl. 12. and the notes there. * Br. Garde, pl. 7. cites 35 H. 6. 40. S. C. but

[S. P. does not appear.—Fitz. cit. Garde, pl. 59. cites S. C. but I do not observe S. P.]

[2. With this agrees the law of Scotland. Skene Regiam Majestatem, 43. b. against 2 and so is the civil law, Justin. Institutiones.]

[3. The age of consent by our law to a marriage, for a female, is the age of 12 years; so that she may marry herself at such age, and this be a perfect marriage, but not before this age. 35 H. 6. 41. b. 53. 8 Ed. 4. 7.]

Fitzh. Garde, pl. 59. cites Hill. 35 H. 6. 40. S. C. but I do not observe S. P.—Br. Garde, pl. 7. cites S. C. & S. P. by Wangford.—See (A) pl. 12.

[4. With this agrees the civil law, Justin. Instit.]

[5. But by the law of Scotland, the age of consent for a female is 14, as well as for a male. Skene Regiam Majestatem, 43. b. 2.]

[6. A woman cannot contrahere sponsalia before 7 years of age, by the law of Scotland, but she may after this age. Skene Regiam Majestatem, 43. b. 2.]

Before the age of 7 years they shall not be said to be

sponsalia; but at that age they are said to be nuptiæ inchoatæ, and at 12 shall be said to be nuptiæ perfectæ & consummatæ. D. 13. a. Marg. pl. 61. cites it as the opinion of Harrison reader of Lincoln's Inn in Lent 1632. and of Noy attorney-general.

(C. 2) What of the Feme shall vest by the Marriage
in the Baron. Freehold Land. How.

1. IF a man takes to wife a woman seised in fee, he gains by the intermarriage an estate of freehold in her right, which estate is sufficient to work a remitter; and yet the estate which the husband gaineth dependeth upon uncertainty, and consisteth in privacy. Co. Litt. 351. 2.

(D) What Things of the Feme the Baron shall have [39]
by the Inter-marriage or Coverture. What not.
Chattels in Action.

[1. IF a statute be acknowledged to baron and feme, they are joint-tenants of this, and the feme shall have all by survivor. 48 Ed. 3. 12. b.]

But the baron alone may make defence, and it shall

serve for both. Br. Baron and Feme, pl. 24. cites S. C. per opinionem.—See (Qc. 3) pl. 1. S. C.

[2. The

Peradventure the same law shall be of an obligation; per Finch. Br. Baron and Feme, pl. 24. cites S. C.

[2. The *same law*, if an *obligation* be made to baron and feme, Contra 48 E. 3. 12. b.]

* Br. Baron and Feme, pl. 24. cites 48 E. 3. 12. per Finch. [3. If *baron and feme recover land and damages*, the feme shall have execution of the damages, and not the executor of the baron. * 48 Ed. 3. 13. † 28 Aff. 45.]

[But the saying is 48 E. 3. 13. a. and gives for reason, that the thing is proved to them true by matter of record.]

† Br. Executions, pl. 83. cites S. C. accordingly. — After the year they sued sci. fa. against the tenants to have execution of the damages, and one came and said that the baron is dead; judgment of the writ, and upon nient desire the writ abated. Br. Brief, pl. 293. cites S. C. — Fitzh. Execution, pl. 112. cites S. C. accordingly.

Fitzh. Execution, pl. 112. cites [4. If baron and feme recover damages in a *real action*, they may sue execution jointly. 28 Aff. 45.]

S. C. & S. P. admitted. — Br. Execution, pl. 83. cites S. C. & S. P. admitted.

Mo. 452. pl. 618. Huntley v. Griffith, S. P. and seems to be S. C. [5. If a *feme sole obligee takes baron*, and the baron makes a letter of attorney to J. S. to receive the money, who receives it accordingly, and after the *feme dies*, the baron shall have an action of account for the money; for by the receipt this was become a thing in possession. Trin. 39 Eliz. B. R. per Popham.]

Goldsb. 160. in pl. 91. S. P. by Popham and Fenner accordingly.

Goldsb. 159. pl. 91. S. C. & S. P. held accordingly, by Popham, Gawdy, and Fenner. [6. [So] If a *legacy* be devised to a *feme* who takes husband, and the baron makes a letter of attorney to J. S. to receive the legacy, and he receives it accordingly, this, by his receipt, is become the chattel of the husband. Trin. 39 El. B. R. agreed.]

Mo. 452. pl. 618. Pasch. 38 Eliz. Huntley v. Griffith, S. C. adjudged, where after the death of the feme the baron died intestate, and his administrator brought account for the money, and held maintainable. — Goldsb. 159. pl. 91. S. C. adjudged accordingly. [7. So if the baron and feme had made a letter of attorney to J. S. to receive the legacy, and he had received it accordingly, by this receipt this ceases to be a thing in action, and is become a thing in possession, and the husband, or his executor, after the death of the feme, may have an account upon this receipt against J. S. Trin. 39 El. B. R. between HUNTLEY AND GRIFFITH, adjudged.]

the feme the baron died intestate, and his administrator brought account for the money, and held maintainable. — Goldsb. 159. pl. 91. S. C. adjudged accordingly.

8. Feme executor takes baron, he shall not have the goods by the inter-marriage; for they are the goods of the testator. Arg. Roll. Rep. 140. cites 9 H. 6.

[40] Dal. 30. pl. 9. Anon. but S. C. accordingly. 9. In detinue by the plaintiff, the defendant pleaded, that after the bailment she took husband, who after his inter-marriage released all actions to the bailee; all the justices held, that the plea was not double; for he could not plead the release without pleading that it was after the marriage; and by the marriage the property of the goods was in the husband. Mo. 25. pl. 85. Pasch. 3 Eliz. Lady Audley's case.

10. Baron surrenders a copyhold of inheritance to himself for life, then to his wife till his son is 21, remainder to his son in tail, remainder to his wife for life, and dies; the ld. admits accordingly; the wife takes baron and dies, another takes administration,

tion, and is admitted by the Id. yet resolved the entry of the baron lawful, unless there is a *special custom* to the contrary; but otherwise it would be if the feme had been only guardian or prochein amy of this land, &c. and judgment for the baron. D. 251. a. pl. 90. Hill. 8 Eliz. Hauchett's case.

11. 300*l.* portion was charged on lands to a feme, who afterwards married W. R. who settled a jointure on her, and had no other portion but the 300*l.* W. R. died, the 300*l.* not paid. The executor of W. R. sued the widow and the heir for the 300*l.* The Id. Keeper declared, that this 300*l.* being to go out of the rent of the lands, and charged upon lands, is not in the nature of a thing in action, but of a rent, and given to the husband by the marriage; and decreed accordingly. Chan. Cases 189. Mich. 22 Car. 2. Withers v. Kelfea.

But the reporter says quere; for the rent belonging to a feme does in case she survive the husband, belong to the wife, and so do the arrears that

incur during the coverture. Ibid. cites Co. Litt. 351. — Salk. 65. pl. 8. S. C. Bill for a discovery of assets, and to have a satisfaction for a debt due by bond brought against the widow and executrix of the obligor. Defendant insists by answer, that she has not assets to satisfy the debt. The case upon the proofs was, that the defendant had lands to the value of 700*l.* and also 500*l.* due to her upon bond, which remained in her brother's hands. Her husband before marriage makes a marriage settlement, and in consideration of a considerable fortune and portion with his intended wife, he does grant, &c. But the particulars wherein her portion did consist did not appear by the deed; and the question was, if this bond to the defendant for 500*l.* part of her portion, (being a chose en action, and not called in by the husband) should be assets in equity to satisfy a debt of the husband, the wife having enjoyed the benefit of the settlement made to her out of her husband's estate, which would have been liable to the debt? It was argued for the plaintiff, that if this bond of 500*l.* had been mentioned in particular as part of the consideration of the settlement, there would be no doubt but it would be assets of the husband; for in equity the husband is a purchaser of it by making the settlement, and that there was no difference where the consideration is general of the wife's portion, especially in this case, where the wife had nothing but lands besides this bond of 500*l.* so that this bond must be taken as the consideration of the settlement, there being no other, and the rather in favour of a fair creditor, who otherwise must lose his debt, and if there had not been such a settlement made, might have had a satisfaction out of those very lands. Parker C. said the case was so very clear, that the defendant's counsel need not to argue it. Creditors in this case cannot be in a better condition than the executor of the debtor, and can it be imagined, that if another person had been made executor to the husband, and such executor had brought a bill against the wife to compel her to assign this bond, that the court would have decreed for the executor? What the law gives the husband by the inter-marriage, is a good consideration for making a settlement, but the husband's making a settlement does not vest in the husband the choses en action of the wife, unless it be expressly so agreed between the parties, and that appears to be part of the consideration of the settlement; for then the husband is a purchaser, and well intitled to them in a court of equity. An account was decreed to be taken of the assets of the husband, but not of this bond of 500*l.* to the wife. MS. Rep. Mich. 6 Geo. in Canc. Heaton v. Halliell.

(E) Chattels real.

[1. IF a feme termor takes husband, yet the term continues in her. * If the baron charges the land
* 7 H. 6. 2. † 9 H. 6. 52. b.]

and dies, yet by the best opinion she shall hold it discharged; for though the baron may give or forfeit it, yet he cannot charge it. Br. Charge, pl. 41. cites S. C. — Fitzh. Charge, pl. 1. cites S. C. that she shall be adjudged in as of her better right, which is before the charge, and that so was the opinion of the court. † Br. Charge, pl. 1. cites S. C. for if he dies without altering the property of it, there it remains to the feme in statu ut ante. — Fitzh. Charge, pl. 2. cites S. C.

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[2. Baron and feme may be jointenants for years. * 47 Ed. 3.
12. b. † 48 Ed. 3. 13. † 2 H. 4. 19. b. || 3 H. 4. 1. b. Fol. 343.
¶ 14 H. 4. 24. b.]

* Br. Cove-
nant, pl. 10. cites S. C. — Br. Baron and Feme, pl. 23. cites S. C. — Fitzh. Joinder en Action, pl. 25. cites S. C. and S. P. implied; for by these books they may join in action of covenant, because the land shall survive to the wife.

† Br. Baron and Feme, pl. 24. cites S. C. but S. P. does

Baron and Feme.

does not appear.——Br. Bief, pl. 80. cites S. C. but S. P. does not appear. † See (X) pl. 1. and the notes there. ‡ See (X) pl. 2, 3. and the notes there.——Br. Baron and Feme, pl. 29. cites S. C. ¶ See infra, pl. 3.

* See (X) [3. The same law of a ward. * 48 Ed. 3. 13. † 14 H. 4. 24. per totum.— b. they may be joint-grantees thereof.]
 † Br. Baron and Feme, pl. 42. cites S. C. for if the baron dies the feme shall have it, and not the executor of the baron, because it is a chattle real; contra of a chattle personal vested; note the diversity.——Br. Ravishment de Garde, pl. 15. cites S. C.——Fitz. Joinder en Action, pl. 20. cites S. C. & S. P. admitted.

Co. Litt. [4. If a feme guardian in socage takes husband, yet the feme continues guardian. Com. 293. b. [Mich. 7 & 8 Eliz. OSBORNE v. CARDEN AND JOYE.]
 351. a. S. P.

† Co. Litt. 5. If a feme has goods, and takes baron, and the baron dies, the executors of the baron shall have the goods, and not the feme; 351. b. S. P.
 ‡ Co. Litt. for the property was changed by the espousals; contra of goods which she has as ¶ executrix. Br. Property, pl. 22. cites 21 H. 7. 29.
 351. a. S. P.

(E. 2) Separate Estate. What shall be said the Wife's separate Estate.

1. *LANDS* were devised to trustees and their heirs, to pay and dispose the rents and profits to a feme covert, or to such person as she by writing should appoint, whether sole or covert, and the husband not to intermeddle, or have any benefit thereof; and as to the inheritance of the premises in trust for such person or persons, and for such estate and estates as she by any writing purporting her will, or other writing, should appoint, and for want of such appointment, in trust for her and her heirs; this is only a trust, and not an use executed by the statute. Vern. 415. Mich. 1686. Nevil v. Sanders.

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But this point was decreed contra in the case following, viz. A. devised lands to M. his daughter,

the wife of B. for her separate and peculiar use, exclusive of her husband, to hold the same to her and her heirs, and that the husband should not be tenant by the curtesy, nor have these lands for his life, in case he survived his wife, but that upon her death they should go to her heirs. B. the husband becomes bankrupt. The commissioners assign the lands in trust for the creditors. The wife by her next friend brought a bill against the assignee and the husband, to compel them to assign over this estate to her separate use. The master of the rolls took it to be a clear case, that it was a trust in the husband, and that there was no difference where the trust was created by the act of law, and where by act of the party. As in case of a devise charging lands with debts and legacies, the heir taking such lands by descent is but a trustee, and no remedy for these debts or legacies but in equity; so in the principal case there being an apparent intention, and express declaration that the wife should enjoy these lands to her separate use, by that means the husband, who would otherwise be intitled to take the profits to his own use, is now debarred, and made a trustee for his wife; and had he been a trustee for J. S. his bankruptcy should not in equity affect the trust estate; and that though in the present case the bankrupt might be tenant by the curtesy, yet he should be but trustee for the heirs of the wife; and the testator having power to have devised the premises to trustees for the separate use of the wife, this court, in compliance with his declared intention, will supply the want of trustees, and make the husband trustee, and the assignees, who, claiming under the husband, can have no better right than the husband, must join in a conveyance for

For the separate use of the wife, and decreed accordingly; per Sir Joſ. Jeyld at the Rolls. 2 Wms.'s Rep. 316. to 319. Mich. 1725. Bennet v. Davis.

The wife cannot have a ſeparate property in a *perſonal thing without a truſt*; per I. d. C. Maccleſfield, in caſe of dowry money claimed by the widow, which was given to herſelf. 2 Wms.'s Rep. 79. Trin. 1722. in caſe of Buſton v. Pitzpoint.

(F) Of what *Things* which are *not* given by the *Inter-marriage*, the Husband hath Power to diſpoſe.

[1.] If baron and feme are *jointenants for years of land*, the baron may diſpoſe of the whole. * 47 Ed. 3. 12. b. admitted. † 48 Ed. 3. 13. 2 H. 4. 19. b. 14 H. 4. 24. b.]

* Br. Baron and Feme, pl. 23. cites S. C. & S. P. admitted.—

† Br. Baron and Feme, pl. 24. cites S. C. but S. P. does not appear.

[2. So if the baron hath a *term in the right of his feme*, he may grant over the whole. 7 H. 6. 1. b.]
but S. P. does not appear.—Br. Charge, pl. 12. cites S. C. but S. P. does not appear.—But *ibid.* pl. 47. cites S. C. & S. P. obiter.—Co. Litt. 351. a.

Fitch. Charge, pl. 1. cites S. C.

[3. If a *feme guardian in ſocage* takes huſband, the baron by his grant of the ward, cannot bind the feme, after the death of the baron. Com. 293. OSBOURN AGAINST CARDEN AND JOYE, b. adjudged.]

[4. If a *baron be guardian in chivalry in right of his feme*, he may diſpoſe and alien the *ward of the body* to another, and this ſhall bind the feme after his death. 34 Ed. 1. Aid. 184.]

[5. If a *baron poſſeſſed of a term for years, grants it over in truſt, and for the benefit of his feme*, he may after diſpoſe or forfeit this truſt and bar the feme. Paſch. 8 Jac. in camera ſcaccarii WICHE'S CASE; for he hath as great power of the uſe which he hath in the right of the feme, as he hath of a term in the right of his feme.]

Lane 54. Trin. 7 Jac. Wilkes's Caſe S. C. Tanfield Ch. B. Snigg and Altham thought the truſt might

be forfeited; but becauſe there was no bill before the court, demanding any thing for the king, therefore the court gave no reſolution, if by equity, the huſband ſhall forfeit a truſt which he had for years in the right of his wife.

[6. If the *baron makes a leaſe for years to another, to the uſe of his feme if ſhe lives ſo long, for the jointure of the feme*, the baron cannot diſpoſe of this truſt. Paſch. 8 Jac. in camera ſcaccarii.]

S. P. by Brock, and not denied. Lane 55. Trin. 7 Jac. in cam.

ſcacc. in Wilkes's caſe, S. C.

[7. [So] If the baron grants over a term *in truſt*, and for the benefit of *his wife and children*; it ſeems he cannot diſpoſe † of the truſt of the children. Dubitatur, Paſch. 8 Jac. in camera ſcaccarii.]

Lane 54. Trin. 7 Jac. Wilkes's caſe, S. C. and Tanfield Ch. B. and

Snigg and Altham thought the baron might diſpoſe of it being only a chattel, as he might have done of a chattel whereof the wife was poſſeſſed, and that he might have wholly releaſed this truſt; but by Bromley, his releaſe ſhall bind only during his life; but the attorney general ſaid he might releaſe all.—See pl. 4.

† [43]

Cro. E. 908. pl. 19. S. C. and S. C. and S. P. affirmed by the doctors of the civil law; and admitted by all the justices. — Noy 45. S. C. and S. P. admitted per cur. — Mo. 665. pl. 910. S. C. and S. P. seems admitted. — S. C. cited, Arg. Roll. Rep. 426. in pl. 19. — S. C. cited by Doderidge J. 3 Bull. 264.

3 Bull. 264. Motteram v. Motteram S. C. and S. P. held accordingly, and therefore by the whole court a prohibition was denied. — Roll. Rep. 426. pl. 19. S. C. and the court inclined accordingly, but advise vult; and it was said that this case is not like the case of Stevens and Totte, because there the thing for which the suit was viz. the legacy was originally due to the baron and feme, and therefore the release of the baron was a good discharge, but here there was no duty in the baron originally. — See tit. Prohibition, (Q) pl. 10. and the notes there.

* Yelv. 256. Trin. 7 Jac. B. R. the S. C. the release was of all actions, quarrels, controversies, claims and demands whatever, which he had or might have against the said C. adjudged no discharge;

[10. If A. promises B. a feme sole, that in consideration that she will marry C. his brother, that he will give B. 10 l. if she survives C. and after B. takes C. to husband accordingly; C. cannot after discharge A. of this promise, by his release to bind B. after his death, because the promise stood in a contingency during the life of C. the husband. Hill. 6 El. [Jac.] B. R. BETWEEN * BELCHER AND HUDSON, Rot. 132. adjudged, where the baron released all demands; and adjudged, that it did not bar the feme. This is cited pl. 16. Jac. 6. in SMITH AND STAFFORD'S CASE, and this is cited, Hobart's Reports, case 279. But there it is said, that the words will not extend to release the promise, without express words of promise.]

for though the promise was present, yet the execution was future, and such as the releasor could have no action upon; but if he had released by express words all promises, or all actions and quarrels which he or his wife had or might have, then it was held that the promise had been released; for the promise being a special cause of action, cannot be released till it comes in esse. — Brownl. 15. S. C. adjudged the release no bar. — Cro. J. 222. pl. 2. S. C. and the plea of the release adjudged ill. — S. C. cited Hob. 216. pl. 280. Hill. 15 Jac. in case of Smith v. Stafford by Hobart Ch. J. as adjudged for the plaintiff, because none of the words would reach it, but says the case was compounded, and so no judgment was entered. — S. C. cited by Warburton J. Noy 16. in case of Smith v. Stafford, as adjudged no bar; but Serj. Altham said that it might well be released by apt and special words, though it was to take effect by contingency in futuro, and so Winch J. also thought, — S. C. cited Hut. 17. as adjudged accordingly; but that lord Hobart said that if he had released all promises it would have discharged the defendant. — S. C. cited Arg. Palm. 99.

† [44]

Fol. 344.

S. P. cited by Popham to have happened upon a

special verdict in the county of Somerset, about the 20 Eliz. and afterwards adjudged, that the remainder being limited in the case to the survivor, the wife surviving should have it, because there was nothing in either to grant over until there was a survivor. Poph. 5. — S. P. held accordingly by Popham Ch. J. and said by him to have been resolved as above. 4 Le. 185. pl. 285. Mich. 29 Eliz. C. B. Anon. — S. C. cited Hut. 17. The baron after marriage purchased a term for years to himself and wife and the survivor,

and the executors, administrators and assigns of such survivor for the residue of the term. Afterwards he mortgaged the term without her joining, proviso to be void on payment by the husband or wife, or the executors or administrators of either, and that until default of payment, the husband, his executors or administrators, should quietly enjoy. The matter of the rolls held this to be a *voluntary conveyance*, and being only a term for years, it is always in the power of the husband to forfeit or alien, and the mortgage is an alienation; for though if the mortgage money had been paid before the day, the mortgage would have been void, and all things would have been *in statu quo*; yet being forfeited, the equity of redemption is become a creature of equity, and decreed it to be assets to pay creditor with whom he had contracted debts 7 years after the mortgage. 2 Williams's Rep. 364. Trin. 1726. Watts v. Thomas.——See tit. Grants (M) pl. 3. and the notes there.

12. If a feme who has a term or interest as executrix by statute merchant takes baron, the baron may grant over the interest without the feme, and good in assise. Br. Grants, pl. 157. cites 24 E. 3. 63.

13. If one is bound to a baron and feme in a statute merchant, the baron alone may make defeasance, and it shall serve for both; per opinionem. Br. Baron and Feme, pl. 24. cites 48 E. 3. 18.

14. If obligation is made to a feme sole, and she takes baron, and the baron releases all actions and dies, the feme shall be barred; and if he does not release and dies, the feme shall have action, and not the executor of the baron. Br. Baron and Feme, pl. 44. cites 7 H. 6. 2.

15. In second deliverance, the defendant made confusance as bailiff to P. and H. his wife, and set forth that the plaintiff being seized of the lands, granted a yearly rent of 10 l. with a clause of distress, habendum to the said H. for life; she afterwards married the said P. and for rent arrear, the defendant made confusance at Lady-day 4 & 5 P. & M. The plaintiff in his replication pleaded an acquittance made the 7 Eliz. by P. (the husband) of 5 l. of the said rent due at Mich. last past; adjudged a good bar to the confusance. Mo. 87. pl. 219. Hill. 10 Eliz. Morton v. Hopkins.

D. 271. pl. 26. S. C. Harper and Dyer thought the arrearages gone by the acquittance, but Welch and Weston contra, because all the arrears

unless those of the last term were due to the feme dum sola fuit, and were not due to the baron.——And. 14. pl. 30. S. C. adjudged that the acquittance was a good bar.——Bendl. 186. pl. 223. S. C. with the pleadings, and adjudged that the acquittance was good.

16. An annuity was granted to a woman for life, who takes husband, and he by express words released the annuity; but adjudged after divers arguments, that the release cannot extinguish this annuity to the wife, it being for her life, but that if she survives she shall have it. Moor 522. pl. 689. Pasch. 40 Eliz. C. B. Thompson v. Butler.

Cro. E. 721. pl. 49. S. C. but S. P. does not appear

17. Baron may release a legacy left to the wife payable 18 months after, though the 18 months are not expired, for he hath an interest in it before the time of payment accrues. Per Montague Ch. J. 2 Roll. Rep. 134. Mich. 17 Jac. B. R. Anon.

So where 'tis made payable out of a reversion expectant on an estate for

life, the husband may assign it. G. Equ. R. 88. Mich. 1714. Atkins v. Dawbury.——If after release of the legacy by the baron, he and his wife *suas in court Christian* for the legacy, the executor shall not have prohibition, because the temporal judges cannot meddle with the legacy, nor by consequence can they determine whether the release will extinguish it; Yelv. 173. cites it as adjudged, 29 Eliz.——So where a legacy of 1000 l. charged upon lands, was given to a feme infant payable at 25 years of age, who marries, and after attains that age; the baron during the minority of the feme, made an assignment thereof for a valuable consideration, and held good, notwithstanding the contingency that then was with regard to her attaining 25. But were it not in strictness to operate as an assignment, yet it would be good as an agreement, especially being for a valuable consideration. Trin. 1732. 2 Williams's Rep. 602. 608. D. of Chandos v. Taibot.

Release (U)
pl. 22. cites
Hill. 6 Jac.
B. R. Bel-
cher v. Hud-
son, S. P.
Hob. 216.

18. A. promises C. that if she would marry B. *if he did not sufficiently provide for her during coverture, then he would leave her 100 l. at his death.* The baron cannot release this, during coverture, by release of all actions and demands, because it is executory, and in contingency; but it may be relieved by a release of *all promises.* Arg. 2 Roll. Rep. 162. Pasch. 18 Jac. cites it as adjudged, and affirmed in error, in Mason's case.

19. It was agreed, that if a *woman do convey a lease in trust for her use, and afterwards marries*, that in such case it lies not in the power of the husband to dispose of it; and if the wife die, the husband shall not have it, but the executor of the wife; and so it was said it was resolved in chancery. Mar. 45. pl. 69. Trin. 15 Car. in Sir John St. John's case.

20. Leases were devised to the defendant by his eldest brother, to be sold for several purposes; and amongst others in trust, *that the defendant should purchase in his own name an annuity of 80 l. per ann. for the life of the plaintiff's wife, and pay the same to her and her assigns.* The bill was to enforce the payment of this annuity. The defendant insisted by answer, that he had constantly paid the annuity to the plaintiff's wife, (*from whom the plaintiff lived apart*) and that the bill was against her consent, and that it was the intent of the donor to be for her only benefit, the will being, that he should buy in his own name the annuity in trust for the plaintiff's wife (who is the defendant's mother) and her assigns; and so insisted that *the plaintiff not inhabiting with her, he ought not to be put to pay the annuity to him.* It appeared by proofs, that *the cause of plaintiff's first absenting himself from his wife, was for fear of debts, and that he had since solicited her by letters to cohabit, but she refused.* The master of the rolls declared, that in this case the husband was the assignee of the wife, and that there being *no negative words by the will to exclude the husband from the annuity*, he could not exclude him; and so decreed the defendant to pay all the arrears of the annuity since the bill exhibited, and the growing annuity for the future, to the plaintiff the husband. Chan. Cases 194. Hill. 22 & 23 Car. 2. Dakins v. Berisford.

Chan. Cases
225. S. C.
Mich. 25
Car. 2. by
Ld. Keeper
Finch, in
totidem ver-
bis. —

Where such
a term in
trust was
conveyed for
a jointure
on the feme
on marriage,
and after-
wards the
husband
died, and

21. The wife having assigned her term in trust for herself before marriage, and then the husband, without the trustees joining, mortgages the term. The husband died. The mortgagee exhibits his bill to have the land conveyed to him, or that they should redeem; and the court dismissed the plaintiff's bill; for since queen Elizabeth's time, it has been the constant practice in this court, to set aside and frustrate all incumbrances and acts of the husband upon the trust of the wife's term, and that he shall neither charge or grant it away; and it is the common way of providing jointures for a woman, to convey a term in trust for her upon marriage, that it may be out of the power and reach of the husband. Neither shall he forfeit it by outlawry or felony, if for jointure; or in pursuance of articles of marriage, or being the wife's term it is assigned before in trust, or if on other good con-
sideration.

consideration it be assigned. 2 Freem. Rep. 138. pl. 174. Doyly v. Perfall, cites 1 Inst. 351. then the widow married

another husband, who made a jolature on her, without any agreement that her first jointure should be thereby barred. Ld. C. Finch decreed, that a sale by the after husband of the trust-term made by the former husband was not good, and should not bind; and a former precedent in point shewn. Chan. Cases 307, 308. Pasch. 30 Car. 2. Turner v. Bromfield. But after award on an appeal to the house of lords, it was adjudged that the said term was well passed away, and that the husband might dispose thereof; and my Ld. chancellor's decree was thereupon reversed; but it was agreed that where a term is assigned in trust for a feme, by the privity and consent of her husband, the husband, without doubt, cannot intermeddle or dispose of it. Vern. 7. pl. 5. cites Mich. 32 Car. 2. Sir Edward Turner's case. S. C. cited as decreed in the house of lords, that the husband might dispose of the trust of the term; and says the Ld. Chancellor seemed to wonder at the resolution. Vern. 18. pl. 10. Mich. 1681. in case of Pitt v. Hunt. S. C. cited accordingly, 2 Freem. Rep. 78. pl. 86. in case of Hunt v. Pitt, S. C.

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22. But if it be an assignment after marriage by the husband, in trust for the wife, that is voluntary, and fraudulent against a purchaser; and thus was the great chequer-chamber case. 2 Freem. Rep. 138. pl. 174. Doyly v. Perfall.

Chan. Cases 225. Mich. 25 Car. 2. S. C. in totidem verbis.

23. If a feme has a trust of a term for years, and marries, the husband may alien it; but when a term is settled for a maintenance or jointure for the wife, it is otherwise; per Ld. Keeper Finch. Chan. Cases, 266. Mich. 27 Car. 2. in case of Bullock v. Knight.

2 Chan. Cases 86. Pasch. 34 Car. 2. Anon. S. C. & S. P. agreed,

where it is in nature of a jointure. Ibid. 114. Trin. 34 Car. 2. S. C. but goes upon another point. 2 Freem. Rep. 82. pl. 88. S. C. & S. P. admitted. If a husband makes a lease for years in trust for the wife voluntary, and he sells it, this may bind the wife, because of the fraud; per Finch. C. Chan. Cases 308. Pasch. 30 Car. 2. in case of Lady Turner v. Bromfield. S. P. by Ld. Keeper Finch. Chan. Cases 225. Mich. 25 Car. 2. because it is fraudulent against purchasers; and said that this was the great exchequer-chamber case.

24. Feme sole possessed of a term for years, mortgaged it to T. for 100 l. and afterwards, a day or 2 before marriage, assigns her interest to trustees in trust for herself for life, and after for her son by a former husband, and then marries D. who was a witness to the trust-deed. D. pays off the mortgage, and takes an assignment, and then surrenders his lease to the reversioner, and takes a new lease for the same term, and dies. The court held, that though the estate in law was wholly in the mortgagee, and the feme conveyed nothing but an equity in trust, yet when the mortgagee assigns over to the husband, the husband has it under the same equity as the mortgagee had, and is just in his place, and no act of the husband can bar the trustees for the feme and her children of their equity; and decreed the new lease to be assigned over to the feme or her trustees, paying to the husband's executors the mortgage-money. 2 Freem. Rep. 29. pl. 32. Hill. 1677. Draper's case.

25. A term was conveyed on marriage in trust for the wife, by way of jointure. The baron afterwards dies, and the feme marries a 2d husband, who settled a jointure of 200 l. a year on her; (whereas the first jointure was of 300 l. a year.) The 2d husband sold the wife's jointure made by the first husband. Ld. Chancellor agreed, that if the husband make a lease for years in trust for the wife voluntary, and he sells, this may bind the wife, because of the fraud; but where a trust is created for a wife, as here in this case, bona fide, the husband can in no-wise bind the wife, unless

Vern. 7. pl. 5. Sir Edward Turner's case, Trin. 33 Car. 2. S. C. says this decree was reversed in the house of lords; but that it was

where

agreed that where a term is assigned in trust for a feme, by the privity and consent of the

baron, there without doubt the husband cannot dispose of it. — S. C. cited 2 Vern. 272. In pl. 255. Trin. 1692. Tudor v. Samyne, where the first husband assigned a term for the separate use of the wife, yet the disposal thereof by the second husband was held good, though he made no provision for her.

where she is examined, as in a fine, or in this court, else no man shall be able to provide for wife or children; and he had no regard to notice, or not, to the purchaser, though in the cause, nor to the 2d jointure; and decreed for the plaintiff; and a former precedent in point was shewn. Chan. Cases 308. Pasch. 30 Car. 2. Turner v. Bromfield.

26. Goods, which the feme has as executor, the baron may dispose of, as well as goods which she has in her own right. Jenk. 79. pl. 56.

27. A. possessed of a term, devises it to his wife for life, remainder to his children unpreferred; and makes her executrix. A. dies; she assents to the legacies; afterwards she takes husband; he sells the term; the wife dies; the children unpreferred enter; their entry is congeable. Jenk. 264. pl. 66.

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28. A husband may release costs adjudged to the wife in spiritual court, unless there be a separation and alimony allowed. 1 Salk. 115. Chamberlain v. Hewson.

29. If the wife hath a chose en action in her own right, and an action is brought by the husband and wife, and they declare ad damnum ipsorum, and they get judgment, by this the property is altered; but otherwise it is, if the chose en action be en outer droit; per Holt Ch. J. Cumb. 311. Hill. 6 W. 3. B. R. in case of Curry v. Stephens.

He may release his wife's share of an intestate's estate. See 10 Mod.

63, Arg. Mich. 10 Ann. B. R. Daeth & Baux.

30. Where a right or duty may by possibility accrue to the wife during coverture, the baron may release it; otherwise not; per Holt Ch. J. 1 Salk. 326. Hill. 11 W. 3. B. R. in case of Gage or Grey v. Acton.

31. A. made a settlement, whereby he created a term for years in trust to raise 400l. a-piece for his two daughters, and one of them marries B. and he and his wife brought a bill, and had a decree to have the 400l. raised and paid; but before it was raised, B. assigns the benefit of this decree to one J. S. in trust, for payment of his debts, and made him executor, and died, leaving his wife and one child unprovided for. The creditors brought a bill to have the benefit of the said assignment; and though it was insisted upon, in behalf of the wife, that there was a difference between a term in trust to raise a sum of money for a woman, and a trust of the term itself for a woman, yet the master of the rolls held, that this was a term for years, and not a sum of money, and therefore not to be distinguished from SIR EDWARD TURNER'S CASE, and must decree it, (though against his conscience) that there may be an uniformity of judgment. Trin. 1703. Ab. Equ. Cases 58. Walter v. Saunders.

32. A.

32. A. devised the *surplus of his personal estate* to his daughter, the wife of J. S. for her separate use, and makes her executor. It being devised to the wife, and not to trustees; when it comes to her, whether it belongs to the husband, or to the wife for her separate use and benefit, the court reserved for further consideration; but the husband having given a note, that the wife should enjoy a mortgage, part of the said estate; it was held that she was well intitled both to the principal and interest. 2 Vern. 659. pl. 585. Trin. 1710. Harvey v. Harvey.

Wms. Rep.
125. Trin.
1710. S. C.

33. A man by his will gives a legacy of 300l. to a feme covert without creating any separate trust of it for her benefit, and this legacy was made payable out of a reversion of lands expectant on an estate for life; the husband sometime after makes an assignment of this legacy to trustees, in trust for the benefit of his children, and after by his will takes notice again of the same legacy, and devises it in like manner for the benefit of his children, and makes his wife executrix, and dies; the estate for life drops. The court decreed, that as the husband had made a good assignment of it in equity, (though as a chose en action it was not assignable at law) that she should be answerable to the children. Mich. 1714. Abr. Equ. Cases 45. pl. 9. Atkins v. Dawbeney.

G. Equ.
Rep. 88.
89. Mich.
1 Geo. 1.
in Canc.
Atkins v.
Dawbury,
S. C. and
has the very
same words.

34. A mortgage in fee to the wife the husband alone cannot dispose of, and therefore if the husband without her joining, assigns such mortgage, and dies, the estate, which is still in the wife, will carry along with it to her representatives the money due thereon, but of a term of years, or the trust of a term, he has the absolute power of, and may dispose without her joining, and that even in case of a lunatic; feme married while in committee's hands, and though the chancery had laid bands on her estate to secure her a settlement, yet the dying in the life of the husband, though no settlement made, and he having assigned it in her life, it was held good; per Cowper C. Ch. Prec. 418. Mich. 1715. in case of Packer v. Windham.

Chan. Prec.
416. Arg.
& 418. cited
per Ld.
Cowper as
the case of
Burnet v.
Kinafton.
—G. Equ.
Rep. 102.
S. C. cited
by Ld.
C. Cowper,
and took
the same
diversity,
* [48]

(F. 2) In what Cases, and by what Act, Things vested in Trustees for the Benefit of the Feme, or the Produce thereof, shall become the Property of the Baron.

1. If a father makes a lease in trust for advancement of his daughter who marries, the husband may clearly dispose of this term, and no remedy at the common law for it; per Williams J. to which the whole court agreed. Bullt. 118. Pasch. 9 Jac. obiter.

2. If a lease be made to the husband to the use of the wife, the husband may sell it for a good consideration; per Williams J. Bullt. 118. Pasch. 9 Jac.

S. C. cited
Hob. 3.
Marg.

3. A *feme sole* conveyed leases to trustees, and after married J. S. she received the rents, and bought jewels with part, and part she left in money, and died. J. S. took letters of administration to her, and the ecclesiastical court insisted on his being accountable, and putting it into an inventory; but per cur. contra; because they are the absolute property of J. S. but things in action he shall have as administrator, and shall be accountable for them; and because part of the money being put out on bonds in the names of others to the use of the wife, the spiritual court would have the husband account for it, and a prohibition being moved for, the court differed; and it was held by those that were against granting the prohibition, that the monies received on the trust is in law the money of the trustees, and that the wife had no remedy for it but in a court of equity, and so he should have it as administrator. The reasons of those who were for granting a prohibition were, because the trust was executed when she had received the money, and that by the receipt the husband had gained property therein as husband, and therefore should not be accountable for it. Mar. 44. pl. 69. Trin. 15 Car. Sir John St. John's case.

4. And it was agreed, that if the trustees consent that the wife shall receive the money, (as in the case above the contrary does not appear) there the husband might gain the property as husband; but because the court conceived that the ecclesiastical court had not jurisdiction, a prohibition was granted. Mar. 45. Trin. 15 Car. in Sir John St. John's case.

(G) What shall be a *Disposition*.

Br. Covenant, pl. 10. cites S. C. but S. P. exactly does not appear. — Br. Baron and Feme, pl. 23. cites S. C. but S. P. does not exactly appear. — Fitzh. Joinder en Action, pl. 25. cites S. C. but S. P. does not exactly appear.

[1] If the baron and feme recovers a term in a writ of covenant, after the death of the baron the feme shall have execution. 47 Ed. 3. 12. b.]

[49] If the wife be possessed of a term [2. The baron may forfeit the land of the feme. 7 H. 6. 2. b. and this shall bind the feme.] for years, and the husband is outlawed or attainted, they are gifts in law. Co. Litt. 351. a.

Co. Litt. 351. a. S. P. and in such case the sheriff may sell the term during her life.

[3. So if it be extended for the debt of the husband, this will bind the feme. 7 H. 6. 2. b.]

Co. Litt. 351. a. S. P. [4. If a lease be made to baron and feme for years, the baron cannot devise the term, for the feme is in by survivorship, before the devise takes effect. Contra 2 H. 4. 19. b.]

*Br. Charge, pl. 41. cites S. C. [5. If the baron hath a term in the right of the feme, and the baron grants a rent out thereof, and dies, the feme shall hold it discharged;

charged; for she comes *paramount* the charge. * 7 H. 6. 1. b. Fitzh. Charge, pl. 1. cites S. C. & S. P. accordingly, by Paslon and Martin. — Co. Litt. 351. a. S. P. — (1) pl. 2. S. C.

[6. [So] If a baron be possessed of a term in the right of the feme, and damages are recovered against him, execution cannot be upon the term of the feme: for she comes *paramount*. † 9 H. 6. 52. b. Contra § 7 H. 6. 2.]

Charge, pl. 2. cites S. C. but S. P. does not appear. — See (1) pl. 4. § Br. Charge, pl. 1. cites S. C. but S. P. does not appear. — Fitzh. Charge, pl. 1. cites S. C. but S. P. does not appear.

[7. But *otherwise* it is if it be extended thereupon, or upon a recognizance in the life of the baron. 9 H. 6. 52. b.]

Br. Charge, pl. 1. cites S. C. but S. P. does not appear. — Fitzh. Charge, pl. 2. cites S. C. but S. P. does not appear.

[8. If for the debt of the baron a *term*, of which the baron is possessed in the right of the feme, be extended, and after the baron dies, the feme shall have the residue, after the extent incurred. 7 H. 6. 2.]

Br. Charge, pl. 1. cites S. C. but S. P. does not appear. — Fitzh. Charge, pl. 1. cites S. C. but S. P. does not appear.

[9. If the baron grants the herbage or vesture of this land, which he holds with his feme for years, and dies, the grantee shall have the herbage or vesture, 9 H. 6. 52.]

[10. If the baron grants part of the term, of which he is possessed in the right of the feme, and dies, the feme shall have the reversion; for this is not disposed of. Perkins, f. 834. D. 9 El. 264. 40. admitted. § Co. Lit. 46. b.]

S. P. agreed by Manwood, and it shall only be an alteration of what was granted. Cro. E. 33. in pl. 16. Trin. 26 Elis. B. R. 200. — S. C. cited in a note. 2 Vern. 63. at the end of pl. 55. § S. C. cited Arg. 2 Lev.

[11. But if the baron reserves a rent upon the grant, she shall not have it, because she comes *paramount* the reservation. Co. Lit. 46. b. But the executor of the baron shall have the rent, contra Perkins, fec. 834.]

S. P. per Periam. Cro. E. 279. pl. 5. Pasch. 34 Elis. B. R. in Loftus's case. — For the rent is not incident to the reversion, because she was no party to the lease. Co. Litt. 46. b. — S. C. cited Arg. 2 Lev. 100. — S. P. in a note, 2 Vern. 63. at the end of pl. 55. cites Co. Litt. 46. b.

[12. If the baron grants the lands which he hath in lease in the right of the feme, *except part*, the feme shall have this part so excepted; for this is not disposed of. D. 9 El. 264. 4. admitted.]

The wife shall have it as annexed to the reversion or term which she had; per Bariam; but the reporter says quære; for the other justices delivered no opinion. Cro. E. 279. pl. 5. Pasch. 34 Elis. B. R. in Loftus's case. — See (C. 2) Blaxton v. Heath.

[13. If the baron, possessed of a term for years in the right of his feme, makes a lease for part of the years to commence after his death,

Cro. E. 287. pl. 2. Mich. 34

& 35 Eliz. *death*, and dies, this is a good lease against the feme; but she shall have the *reversion*, and not the executor of the baron. Pop-ham's Reports, 4. adjudged.]

judged; but reports it as a jointenancy in the baron and feme. — S. C. cited Mo. 395. pl. 514. in a note there, as adjudged that the lease was good. — S. C. cited by Gawdy J. as adjudged accordingly. 2 Rep. 155. a.

[14. If a feme, possessed of a term, takes husband, and they grant the term upon condition, and re-enter for the condition broke, the feme shall have the term again.]

140. 3. pl. 9. Young v. Radford, S. C. but not exactly S. P. — Brownl. 129. S. C. but S. P. exactly does not appear. — See (H) pl. 11. S. C.

[15. So if a feme possessed of a term takes husband, and they grant the term upon condition, if their executors or administrators pay 10l. to re-enter, and after the baron pays the 10l. this is not any disposition, but they shall be possessed in the right of the feme, for though he paid the money to redeem, yet perhaps he received the money when it was mortgaged. P. 12 Jac. B. between RADFORD AND YOUNG, per curiam.]

[16. If a baron possessed of a term in the right of his wife, grants it to J. S. if he lives so long, and dies, the feme shall have this possibility of a reversion, if J. S. dies within the term, and not the executors of the baron. Pasch. 12 Jac. B. per two justices.]

[17. If a baron possessed of a term in the right of his feme, grants it over upon condition that the grantee shall pay 10l. to his executors, the baron dies, the condition is broke, the executors of the baron enter, the feme shall not have the term; for this was a disposition of the term, all the interest being granted over. Co. Lit. 46. b.]

Roll. Rep. 359. pl. 11. S. C. and by Coke Ch. J. the feme shall have it after the death of the baron. — 3 Bulf. 164. S. P. by Coke Ch. J. and says that the husband, after such recovery, shall have it in statu quo.

[18. If baron and feme are ejected of a term in the right of the feme, and the baron recovers in an ejectment brought by him, in his own name only, this is an alteration of the term, and vests it in the baron. Co. Lit. 46. b.]

19. If a feme executrix takes baron, and the baron releases to the creditor all actions generally, this extends to all his proper actions, and to the actions which the feme has of her own, or as executrix. Br. Baron and Feme, pl. 80. cites 39 H. 6. 15.

20. A release by the husband of all demands, will release a debt due to the wife, because the husband only could demand it. But a release of all actions will not release it. Arg. 10 Mod. 165. cites 21 H. 7. 29. b.]

21. If a baron has a term in right of his wife, and he is outlawed or attainted, they are gifts in law. Co. Litt. 351. 2.

[51] Dal. 52. pl. 25. S. C. held accordingly.

22. If baron has a term in right of the wife as executor, and he purchases the reversion, the term is extinct as to the feme, if she survives; but in respect of all strangers she shall make account.

count, as assets in her hands. Held by all the justices. Mo. 54. ^{* Because the husband has done an act which destroys the term, viz. the purchase. But intermarrying with him in reversion does not extinguish the term; for the husband has not thereby done an act to destroy the term; but the marriage is the act of law; per Manwood J. Godb. 2. pl. 2. Pasch. 17 Eliz. C. B.}
pl. 157. Pasch. 5 Eliz.

23. Lessee for years assigned the term to the wife of the lessor and a stranger; and afterwards the lessor bargained and sold the land for money by deed inrolled. The stranger died; the wife claimed to have the residue of the term not expired. Whether by bargain and sale the term of the wife was extinct or not, was the question: it was said it was not; but contrary if the husband had made a feoffment in fee. The case was not resolved. Mo 171. pl. 304. Mich. 26 & 27 Eliz. Anon.

24. Husband and wife, jointenants during the coverture for sixty years. The husband let all the lands for 70 years, to begin immediately after his death, and died; the wife survived. It was adjudged a good lease; for there is a good term created in interest, though not in possession; and the husband having an interest to dispose of in his life, he might dispose of all his term, and it should bind the wife. Cro. E. 287. pl. 2. Mich. 34 & 35 Eliz. B. R. * Grute v. Locroft.

as adjudged accordingly. ^{* S. C. cited 1 Rep. 155. a. as of a demise for 70 years by one that had a lease for 90 years, and that the grant was good; but nothing said of its being made by the baron, but that the lease was made to the baron and feme; and that the reason why it was good was because he demised all his land, habend' after the death of the lessor for 70 years; so that there was sufficient certainty. But had he granted so much of his term as should be arrears at the time of his death, this would be uncertain, and not good; and this diversity put by Gandy J. was agreed by Popham and the whole court. — Mo. 395. pl. 514. cites S. C. that the baron and feme were jointenants for 99 years, if they or either of them should so long live, and that the baron demised the land for 70 years, to commence after his death, and died, living the feme; and adjudged a good lease against the feme who survived.}

25. Lease was made to baron and feme for years, who enter; the lessor afterwards infeoffs the baron, who died seised. The feme survives, and claims the term, and betwixt the feme and the heir of the baron, the debate was whether the term was extinguished; and it was held per totam curiam, that by the acceptance of the feoffment, the baron hath surrendered the term, and it is extinguished. But if the conveyance had been by bargain and sale inrolled, or by fine, it had been otherwise; and it was adjudged for the plaintiff. Cro. E. 912. pl. 24. Mich. 43 & 45 Eliz. Downing v. Seymour.

26. The baron had a term in right of his wife, and only took a covenant for further assurance, and it was adjudged that that altered the property. Cited Vern. R. 396. pl. 366. Pasch. 1686. as the case of Norden v. Levett.

S. P. — Freem. Rep. 442. pl. 398. S. C. is not S. P.

27. If baron + grants a rent-charge out of a term which he has in right of his wife, that does not alter the property; but if he makes a demise of the term itself, though but for a fortnight, that will alter the property. Arg. Vern. 396. in pl. 366. Pasch. 1686. ^{+ Co. Lit. 351.}

28. Baron

28. Baron assigns to trustees goods which his wife has, as executrix, in trust for such uses as he by deed or will should appoint. This alters the property of the estate. 2 Vern. 287. pl. 275-Pasch. 1693. Ashfield v. Ashfield.

* 29. A disposition by the husband by will of a mortgage of the wife's, is not good; for the interest he had is spent, and she is in by survivorship before the will can take place. Arg. Ch. Prec. 120. Trin. 1700, in case of Burnett v. Kinaston.

The wife was no party to the articles, and soon after died without issue, and decreed for the administrator de bonis non of the wife, Ch. Prec. 118. S. C. — S. C. cited Arg. G. Equ.

30. A portion was secured by a mortgage in fee. The baron after marriage assigns his interest to trustees, and by articles the money was to be called in to purchase land to the use of husband and wife, and their issue; remainder in fee to the husband; the husband died. Per cur. the baron had not absolute power over the mortgage, but being as a *chose en action*, he had only a right to reduce it into a possession, and not having so done in his lifetime, his assignee stood but in his place, and could only have the baron's power, which was to reduce it into possession in his lifetime; and not having so done, it survived to the wife notwithstanding the articles, and must go to her administrator, 2 Vern. 401. pl. 371. Mich. 1700. Burnet v. Kinaston.

Rep. 72. & ibid. 102. by the lord chancellor, Trin. 1 Geo. — S. C. cited Arg. 2 Vern. 502. in pl. 451. — S. C. cited by Mr. Vernon, Chan. Prec. 416. — 2 Freem. Rep. 239. pl. 310. S. C. and the lord keeper being of opinion, that the property of the money was not altered by the covenant, the bill was dismissed. — S. C. cited Arg. Chan. Prec. 419. and ibid. 418. by Ld. C. Cowper. — G. Equ. Rep. 101, S. C. cited Arg. and ibid. 102. by the lord chancellor.

31. The wife had a term, the baron made an under lease for ten years, and upon borrowing money of lessee, covenanted to grant him another lease after the end of the ten years, and to continue during the time he had any right, but died before he made such lease; it was decreed to be a good disposition of his term in equity. 9 Mod. 42 Trin. 9 Geo. 1, Steed v. Cragh at the Rolls.

(H) What Things the Baron shall have after the Death of the Feme.

† F. N. B. 121. (C) S. P. because it was a duty

[1.] If a feme having a rent for life takes baron and dies, the baron shall have the arrears incurred during the coverture, † 10 H. 6. 11, 12. Co. 4. Ognel. 51.]

In him during the marriage, and the English edition cites S. C. — Co. Lit. 162. b. in the end of the explanation of the statute of 32 H. 8. cap. 37. — Co. Lit. 351. a. S. P. — An annuity was granted, to a feme sole for life, who afterwards married; arrears incur, and the wife dies, whereby the annuity determines; adjudged, that the husband shall have an action of debt at the common law, because an annuity is more than a thing in action, and may be granted over. Ow. 3. Pasch. 26 Eliz. anon.

Co. Lit. 162. b. 351. a. [2. But by the common law, he shall not have the arrears incurred before the coverture. Co. 4. Ognel. 51.]

[3. But

Baron and Feme.

52†

[3. But this is aided by 32 Hen. 8. Co. 4. Ognel 51.]

Co. Lit.
162. b.

351. b. — See the exposition of this statute, 32 H. 8. cap. 37. l. 3. at tit. Rent (S. b) fol. 344.

[4. If a feme leases for years, rendering rent, and after takes See (H. a)
husband and dies; the baron shall have the arrearages incurred pl. 1. S. C.
during the coverture. 10 H. 6. 11.]

[5. If a feme seignioress takes baron, the rent incurs, and hath
issue and dies, by which the baron is tenant by the curtesy of the
seignior, he shall have the said arrears incurred during the co-
verture. Kell. incerti temporis 118. b.]

[53]

[6. If baron and feme, in the right of the feme, be seised of
an advowson, and the church becomes void, and after the feme dies,
yet the baron shall present to this church; for this cannot be
granted over, yet it is not merely a thing in action. Co. Lit.
120.]

Co. Litt.
351. a. In
such case he
may have a
quare impe-
dit in his
own name,
as some

hold. — But if the church had fallen void before the marriage, it was merely in action before the
marriage, and therefore the husband should not have it although he survive her. Co. Litt. 351. b.
— B. and his wife brought a quare impedit against H. and made title to present to the church in
the right of his wife, and after the issue joined, and before the venire facias the wife died; and the
plaintiff shewed, that himself had took out a venire facias in his own name; and Winch. was of
opinion that the writ was not abated, because this was a chattel vested in the husband during the life
of the wife. Winch. 73. Pasch. 22 Jac. C. B. Blunt & al' v. Hutchinson.

[7. But if a man be bound to a feme covert, and she
dies, the baron shall not have this obligation without admini-
stration purchased; because it is a thing in action. Co. Lit.
120.]

[8. If the baron be possessed of a lease for years, of land,
in the right of the feme, and after the feme dies, the interest of
the lease is presently, by law, vested in the husband, and he shall
have it, and not the administrator of the feme. * D. 8 Eliz.
251. 90. per curiam adjudged, Com. WROTTESLY AND ADAMS,
192. b. Curia b. Co. Lit. 46. b.]

*Hauchet's
case. —
G. Equ.
Rep. 234.
S. P. in
the time
of Geo. 2.
in the ex-
chequer in
Ireland, in
case of
Barnwell &
al' v.
Russell &

[9. So if the baron be possessed of a ward in the right of the
feme, and the feme dies, the interest of the ward is cast upon
the husband, and he shall have it without taking out admini-
stration.]

al' — Vaugh. 185. Vaughan Ch. J. cites S. C. viz. a copyholder in fee surrenders to the
lord, ad intentionem that the lord should grant it back to him for term of life, the remainder to
his wife, till his son comes to twenty-one, remainder to the son in tail, remainder to the wife
for life. The husband died; the lord at his court granted the land to the wife till the son's
full age; the remainders ut supra. The wife marries, and dies intestate; the husband held in
the land; the wife's administrator, and to whom the lord had granted the land, during the
minority of the son, enters upon the husband. This entry was adjudged unlawful, because it was
the wife's term; but otherwise it had been, if the wife had been but a guardian, or next friend
of this land.

[10. The same law is of the ward of land.]

Chattels real,
as leases for

years, wardships, &c. are not given to the husband absolutely (as all chattels personal are) by the
inter-marriage, but conditionally, if the husband happens to survive her, and he has power to alien
them at his pleasure; but in the mean time the husband is possessed of the chattels reals in her
right. Co. Litt. 299. b. 300. — All chattels personal in possession in her own right are given
to the husband absolutely by the marriage, whether the husband survives the wife or not. Co.
Litt. 251. b.

Chattels

Chattels real consisting *severely* in action, the husband shall not have by the inter-marriage, unless he recovers them in the life of the wife, albeit he survive the wife, as a writ of right of ward, a *warder maritagii*, a *forfeiture of marriage*, and the like, whereunto the wife was intitled before the marriage. Co. Litt. 351. a.

But *chattels real* being of a mixed nature, viz. partly in possession, and partly in action which happen during the coverture, the husband shall have by the inter-marriage if he survive his wife, albeit he reduces them not into possession in her life-time; but if she survives him, she shall have them. As if the husband be seised of *rent-service*, *charge*, or *seck*, in the right of his wife, and the rent becomes due, during the coverture the wife dies, the husband shall have the arrearages; but if the wife survive the husband, she shall have them, and not the executors of the husband. Co. Litt. 351. a.

Hob. 3. pl.
5. Radford
v. Young,
S. C. ad-
judged.—
Brownl. 129.
S. C. adjud-
ged accord-
ingly.—
4 Le. 185. pl.
285. Mich.
29 Eliz. C.
B. Anon. cites 20 Eliz. on a special verdict before Popham Ch. J. but the same was not resolved.—
(G) 15. S. C.

[11. If a feme possessed of a lease for years takes husband, and they join in a grant of the term upon condition, that if they, their executors, or administrators, pay 10 l. by such a day, it shall be lawful for them to re-enter, and after the feme dies, and the baron pays the 10 l. and enters, and dies, his executors shall have the term, and not the administrator of the feme; because the interest of the term survived to the husband. Pasch. 12 Jac. B. between YOUNG AND RADFORD, adjudged. Hob. Reports 4.]

{ 54 }
* Fol. 346.

[12. If the baron be possessed of a ward in the right of the feme, as (*) guardian in socage, and the feme dies, the baron shall not have it; for it belongs to the *prochein amy*. D. 8 El. 251. 90. Com. 294. OSBURN AGAINST CARDEN AND JOYE.]

Cro. E. 466.
(his) pl. 15.
Hill. 38 E.
fig. B. R.
Wytham v.
Waterhouse,

[13. If a term for years be granted in trust to the use of a feme covert, the baron shall not have this trust after the death of the feme. Pasch. 10 Jac. B. per Coke, to be adjudged in WATERHOUSE'S CASE.]

S. C. the defendant took administration of the plaintiff's wife's goods, and the plaintiff sued the defendant in chancery to have this term; but it was there decreed, by advice of all the justices of England, that neither the term nor the use thereof appertained to the plaintiff.-----Toth. 155. S. C. held accordingly.-----Co. Litt. 351. a. S. P. and cites S. C. resolved by the justices; for it consisted in privacy.-----Poph. 106. ARTHUR JOHNSON'S CASE, S. C. reports the term granted by her former husband to her two brothers in trust for her, and adjudged for her brothers the administrators against her second husband.-----4 Inst. 87. cites S. C. as reversed by the chancery to the judges, and by them resolved accordingly.-----S. P. agreed accordingly, Mar. 45. pl. 69. Trin. 15 Car. in St. John's case.-----S. C. cited accordingly All. 15. Trin. 22 Car. B. R. but Roll said, that it had been since resolved, that the husband should have it in that case.

14. If tenant in dower takes a second baron, and they two lease the land which she had to her dower of the dowment of her first baron for years, rendering rent, and dies, the second baron shall have that which was arrear in the time of the wife, and not the heir; for he is a stranger to the lease, and by the death of the tenant in dower the lease is void. Br. Rents, pl. 10. cites 14 H. 6. 26.

15. If baron be possessed of a term for 20 years in right of his wife, and he makes a lease for 10 years, rendering rent to him, his executors, and assigns, and dies, though the wife survives, she shall not have the rent, because she comes in paramount the lease. 4 Le. 185. pl. 285. Mich. 29 Eliz. cites it as resolved by Popham Ch. J. on a special verdict in the county of Somerset, 20 Eliz. Anon.

16. *A trust of lease for years* for a wife does not, after the wife's death, go to the husband in equity, as it was resolved. Jenk. 245. in pl. 30.

If a feme sole assigns a lease in trust, and after takes

husband, and dies, the administrator of the feme shall have this term. Lane 113. cited by Tansfield as decreed in chancery, with the opinion of the judges in Denny's case. — If a man marries a feme who is the cestui que trust of a term, if she dies the trust will not survive to the husband, but shall go to the executor or administrator of the wife; and this was said to be Witham's case, and that is the difference where the wife has an estate in law in a term, and where she has only a trust. 2 Freem. Rep. 62. pl. 70. Mich. 1680. Hunt v. Baker.

17. *Two femes jointenants of a lease for years*, one of them takes husband and dies, yet the term shall survive; for though all chattels real are given to the husband if he survive, yet the survivor between jointenants is the elder title, and after the marriage the feme continued sole possessed; for if the husband die the wife shall have it, and not the executors of the husband; but otherwise of personal goods. Co. Litt. 185. b.

18. If a feme sole be possessed of a chattel real, and be thereof disseised, and then takes husband, and the wife dies, and the husband survives, this right is not only given to the husband by the inter-marriage, but the executors or administrators of the wife shall have it; so it is if the wife have but a possibility. Co. Litt. 351. a.

G. Equ. Rep. 234. in Tempore Geo. 1. S. P. in the exchequer in Ireland, in case of Bannwell & al' vs

Russell & al' and cites S. C.

19. If the wife be possessed of *chattels real in auter droit*, as executrix or administratrix, or as guardian in socage, &c. and she inter-marries, the law makes no gift of them to the husband, altho' he survived her. Co. Litt. 351. a.

20. If a woman grants a term to her own use, and takes husband, and dies, the husband surviving shall not have this trust, but the executors or administrators of the wife; for it consists in privacy, and so it has been resolved by the justices. Co. Litt. 351. a.

[55]

21. If husband dies before he seises an *estray* which happened in a manor of the feme's, she shall have it; because there is no property before seisure. Co. Litt. 351. b. (m)

22. Goods which a feme has as *executrix* remain in and to her if her husband die, and if she herself die her husband shall not have them, unless he be his wife's executor, and so executor to the first testator; for they were hers in auter droit, viz. as she represented the person of the testator. Went. Off. Ex. 86, 87.

Or unless some alteration be of the property Went. Off. Ex. 206, 207.

23. A bond was given to a feme sole, who takes baron, and dies, J. S. took out letters of administration to the feme, and brought an action of debt upon this bond; the obligor pleaded, that by the marriage the debt became due to the baron. But the court said, that it did not; for it was a thing in action, and therefore the plea is not good. Sty. 205. Hill. 1649. B. R. Cowley v. Locton.

No debts due to the wife dum sola shall go to the husband by virtue of the inter-marriage, if

she dies before they are recovered, but her administrator will be intitled to them, which may be the husband, but then he has a right only as administrator, and the reason is, because such debts, before they are recovered, are only choses en action. Agreed. 3 Mod. 186. Hill. 3 Jac. 2. B. R. in case of Ohrian v. Ram.

24. A

24. *A sum of money was provided by settlement of lands for raising daughters portions.* One of them marries, and dies before her portion paid. The husband takes out administration. This administration is pro forma only; for here he had a right to the money, as a portion or provision for his wife. Chan. Cases 169. Trin. 22 Car. 2. Hurst v. Goddard.

25. *Legacy devised to a daughter to be paid out of lands mortgaged to the father, which mortgage was forfeited in testator's life.* She married the plaintiff, and died. The husband takes out administration, and the legacy was decreed to him. Fin. R. 91. Hill. 25 Car. 2. Clerk v. Knight & Baker.

26. If a person dies *intestate* possessed of goods, and a *feme covert* and another are next of kin, and administration is granted to the other only, and the feme dies within the year, before any distribution; yet the baron by taking administration to his feme shall be intitled to her share, it being an interest vested in her upon the death of the intestate. Carth. 51. Trin. 1 W. & M. in B. R. Brown v. Farndell.

(I) What Charge of the Baron shall bind the Feme.

See (G) pl. 5. and the notes there.

[1. If a baron seised for life, or in fee, in the right of the feme, grants a rent, and dies, the feme shall hold it discharged. 9 H. 6. 52. Curia.]

* Br. Charge. pl. 1. cites S. C. & S. P.—Fitzh.

[2. So if the baron possessed for years in the right of the feme, grants a rent, and dies, the feme shall hold it discharged. * 9 H. 6. 52. For she comes paramount the charge. † 7 H. 6. 1.]

Charge, pl. cites S. C. accordingly.—(F) pl. 5. S. C. † Br. Charge, pl. 41. and in pl. 1. ibid. cites S. C. held accordingly; for by his dying without altering the property, it remains to the feme in the same state as before.—Fitzh. Charge, pl. 1. cites S. C.—(G) pl. 5. S. C.

If feme has a lease for years, and takes baron, the baron may surrender or forfeit the lease, because it is only a chattel, and yet he cannot charge it; and yet to the king it may be charged: Br. Forfeiture de Terres, pl. 69. cites 7 H. 6. 1.

† If a man be possessed of certain lands for term of years, in the right of his wife, and grants a rent-charge, and dies, the wife shall avoid the charge; but if the husband had survived, the charge is good during the term. Co. Litt. 184. b.

† [56]
See (G)
pl. 6.

[3. If baron and feme are tenants for life, and the baron acknowledges a recognizance, the feme shall hold it discharged after the death of the baron. 8 R. 2. Aid del Roy, 114.]

If the husband be possessed of a term for years in

4. If the baron possessed of a term in the right of his feme, is condemned in a judgment, or acknowledges a statute, and dies, this shall not be extended upon the feme. 9 H. 6. 52. b.]

right of his wife, it may be sold on a *fi. fa.* and yet it is not actually transferred to the husband by the inter-marriage; per Parker Ch. J. Trin. 1714. Wms.'s Rep. 258. in case of Miles v. Williams.—See (G) pl. 6.

Prerogative (E) pl. 5. S. C.

[5. If the baron be indebted to the king, and purchases lands for years to him and his wife, and dies, this land shall be put in execution for the said debt, because the baron had power to dispose of the said term. 50 Aff. 5. adjudged, Co. 8. Sir GERARD FLEET-

WOOD,

woon 5. [171.] Quære of this; for the execution does not relate to a chattel.]

6. Baron cannot prejudice the wife for her *franktenement* or *inheritance*. If she is intitled to dower of the lands of her first baron, and her 2d baron *accepts for dower less than a 3d part*; after the death of the 2d baron she may wave it, and have her full third part. Jenk. 79. pl. 56. cites 32 E. 1. Fitzh. Dower 121.

7. Where the baron is indebted to the king, and he and his feme purchase land for 60 years, and he dies, the feme shall be charged. Br. Jointenants, pl. 30. cites 50 Aff. 5.

8. And yet if A. be indebted to the king, and A. and B. purchase jointly in fee, and A. dies, and B. survives, he shall not be charged. Note the diversity; for the other is only a *chattel*, all which the baron may alien without his feme. Br. Jointenants, pl. 30. cites 50 Aff. 5.

9. Baron made a lease of the wife's lands, and the lessee being ignorant of the defeasible title, built upon the land, and was at great charge therein. The baron died, and the wife set aside the lease at law; but was compelled in equity to yield a *recompence* for the building and bettering the land; for it was worth so much the more to her. Chan. Rep. 5. in the EARL OF OXFORD'S CASE, Arg. cites it as appearing by a judgment-roll of 34 H. 6. of the case of Peterfon v. Hickman.

10. An *avowry* is made upon the husband and wife, where the wife is the tenant. In this case no *disclaimer* lies; for the wife cannot be examined in this case; and the husband's disclaimer shall not hurt the wife for her freehold or inheritance any more than his confession shall. Jenk. 143. pl. 97. cites 14 H. 4. 18.

See tit. Disclaimer (C)

11. Baron alone aliens the land of the wife by *fine with proclamations*, and dies. Five years expire after his death without action or entry of the wife. It is a bar for ever to the wife and her heirs. D. 72. b. pl. 3. Mich. 6 E. 6. Anon.

12. Baron alone makes a lease of the wife's land, and dies. The lease, as to the possession, remains in full force till she avoids it by her entry; but as to the right, it determined by the death of the husband. Arg. 3 Bulst. 272. cites Pl. C. 65. b. [but it should be 137. b. 6 E. 6.] in Browning and Beeston's case; and cites 9 H. 6. 43. and 28 H. 8. Dyer, fol. 28. [b. 29. a.]

13. In debt on bond for performance of covenants in an indenture between the defendant and A. his wife of the one part, and the plaintiff of the other part. The jury found the husband sealed the deed, but not the wife; the justices held that if the husband had sealed and delivered it in the name of the wife, it had been the deed of the wife during the life of the husband; and if they by indenture had bargained and sold land of the wife rendering rent, it had been a good deed of the wife, because she might have afterwards accepted the rent, and made the deed good. Cro. E. 769. pl. 12. Trin. 42 Eliz. B. R. Shipwith v. Steed.

[57]

14. Husband devised his land to his wife during the minority of his son and dies. He has only a posthumous son. By the will the

Baron and Feme.

wife has power to make leases, to raise money to pay debts, &c. She enters and takes the profits and marries a second husband; he lives some years and takes the profits, and dies. She leased some part according to the will, and continued taking the profits of the rest. The son comes to 21, and proves a revocation of the will, and prays his mother may account. Ordered that she account for all the profits that herself or her husband took; for she shall be said to take them as guardian till 14, and after as bailiff, and was to answer what her husband took as in a devastavit. And the wife having no notice of the revocation, had paid legacies according to the will, which were charged on the lands. Those were ordered to be allowed, but as for the leases, though for fines and full rents, the court would not make them good, because she could not set or lease lands. Chan. Cases 126. Pasch. 21 Car. 2. Hele v. Stowell.

15. If *feme executrix survives*, she shall be charged for damages recovered upon a devastavit against her and her baron, for waste committed by the baron during the coverture, but she shall not be charged for costs recovered against the baron *de bonis propriis*; and judgment accordingly. 2 Lev. 161. Hill 27 & 28 Car. 2. B. R. Horsey v. Daniel.

16. Devise of 800 l. to be invested in land for the benefit of the wife of J. S. for her life, and afterwards to her children, and the interest of the money to go in the mean time to such person as would be intitled to receive the profits. J. S. the husband becomes bankrupt. Per cur. this not being a trust created by the husband, nor any thing carved out of his estate, but given by a relation of the wife's, and intended for her maintenance; it is not liable to the creditors of the husband, and decreed the interest to be paid to the trustee to be laid out in land and settled according to the will. 2 Vern. R. 96. Vandenanker v. Desborough.

17. A feme had 1000 l. and it was agreed by marriage-articles, that 700 l. of it should go to pay his debts. The husband after marriage, without the wife, assigned the 300 l. likewise to creditors, and decreed so much to be paid as was really due to them, and the residue, if any, to be put out for her benefit. Chan. Prec. 325. Hill. 1711. Povey v. Brown, Amhurst & al'.

18. If a bill of exchange be made to the *feme dum sola*, the husband may assign it, and the assignee shall bring the action in his own name. Per Parker Ch. J. Wma.'s Rep. 255. Trin. 1714. in case of Miles v. Williams.

H'r husband is the proper person to assign the note.
Per Parker Ch. J. 10 Mod. 246. in S. C.

19. No agreement of the husband to part with the wife's inheritance, shall bind the wife, or be carried into execution. MS. Tab. Feb. 9, 1721. Bryan v. Wolley.

20. If the wife had recovered a judgment at law, and elegit thereupon, the husband would have had a power to assign that interest of the wife, for or without consideration &c. in trust for himself or as he pleased; so by parity of reason, the wife having a decree of a court of equity for her demand, and to hold and enjoy till satisfaction, &c. the husband

husband has the same right and power to dispose of this equitable interest of the wife, as he would in case of a demand recovered at law, &c. and though after marriage the husband is to use the wife's name in the proceedings in equity in this and the like cases, whereas he need not at law, that makes no difference in the thing, or in the right, but in the form and manner of proceeding, &c. Per Ld. Hardwick MS. Rep. Feb. 26, 1734. in the case of Paschall v. Ld. Carteret & al'.

(K) What Things the Feme may *do without* the Baron.

[1. IF a feme sole makes a feoffment upon condition to re-infeoff Br. Tender, pl. 32. cites S. C. says that she did request, and they refused, and the her at what time she will, and after takes husband, she may require the feoffee to re-infeoff her without her husband, and if the feoffee does not do it, the condition is broke. 35 Aff. 11. adjudged.]

baron and feme entered, and good. Brook says, and so see a good request by a feme covert without her baron, for the conditions are strict as it seems.—Br. Conditions, pl. 117. cites S. C.—Br. Coverture, pl. 42. cites S. C.—Br. Feoffments, pl. 31. cites S. C.—Br. Remitter, pl. 45. cites S. C.—2 Brownl. 69. in case of Portington v. Rogers, Arg. cites S. C. contra, viz. that she cannot make request after coverture; but *ibid.* 140, 141. Arg. in S. C. says that the request is good after marriage, and cites 25 Aff. 11. [but is misprinted for 35 Aff. 11.]

2. Nor she cannot restrain the livery of her baron of the land of the feme. Br. Coverture, pl. 76. cites H. 21 E. 3. 6.

3. If land is given to a feme upon condition to sell, and to distribute the money, &c. for the soul of the feoffor, and she takes baron, and the baron and feme sell and distribute the money, and the baron dies, the feme shall not have *cui in vita* nor *subpoena*; for the sale is good according to the condition. And per Brooke J. the feme may sell to any except to her baron; and this by deed, not by fine. Br. Cui in Vita, pl. 16. cites 34 E. 3.

4. The feme cannot waive her interest gained by the disseisin during the life of the baron. Br. Affise, pl. 230. cites 35 Aff. 5.

5. Feme covert shall not be executrix, without the assent of her baron. Br. *ibid.* cites Hill. 2 H. 7. 15.

6. Feme covert executrix may give acquittance on receipt of a debt by herself without the baron; all the justices said that so it seems. And. 117. in pl. 164. Hill. 22 Eliz.

7. A feme covert may do things in law, if the baron agrees to it. Kelw. 163. a. pl. 4. Mich. 3 H. 8. but without such assent she cannot make, create, or limit use of land. And. 164. pl. 209. Mich. 29 & 30 Eliz. in case of Colgate v. Blythe, alias Kenn's case.

Note, that a sale or gift to a feme covert, or a sale of the

goods of the baron by a feme covert, is good, if the baron agrees, or does not disagree; per cur. Br. Contra, pl. 3. cites 27 H. 8. 25.

8. Tenant for life, remainder to his daughter and heir apparent, who was a feme covert, in fee. The father made a feoffment in fee with warranty, and afterwards levied a fine with warranty to certain uses, and died. The daughter for herself, and in the name



of her husband, and by his consent, *entered within the year, and claimed the inheritance.* The justices held, that the entry by the wife alone, *without her husband, he agreeing to it, was good; and that the warranty descending upon her during the coverture, did not bind her, because her entry was lawful. Cro. Eliz. 72. pl. 28. Mich. 29 & 30 Eliz. B. R. Ards v. Simpson.

3 Le. 266.
pl. 15 S. C.
and the plea
was held not
good.

9. *Assent by the wife of T. to F. to enter into the house of T. the husband, and take goods which were there of A.'s, who had sold them to F. is no justification in trespass brought by the husband against F.* Per 3 justices, contra Gawdy J. Cro. E. 245. pl. 5. Mich. 33 & 34 Eliz. B. R. Tailor v. Fisher.

Yelv. 1.
S. C. and
Brownl.
seems only
a translation

10. Feme covert cannot make a † *letter of attorney* to deliver a lease upon the land. Brownl. 134. Pasch. 44 Eliz. Wilton v. Rich.

of Yelv.-----2 Brownl. 248. Pasch. 9 Jac. B. R. Plomer v. Hockhead, S. P.-----But if the declaration is of a lease by the husband only, it is good. Noy 133. Plummer v. Hockett, S. C.-----See Gardiner v. Norman.

† In debt baron and feme continues till exigent baron appears, but will not suffer her to appear. Per cur. the wife may make attorney to prevent being waived. D. 271. b. marg. pl. 27. cites Pasch. 42 Eliz. C. B.

See 2 H. 7.
15. b. pl. 23.

11. She cannot take an *executorship upon her* without the consent of her husband at the common law; though otherwise perhaps by the spiritual law. But if the will be proved, and execution committed to the wife, though against her husband's mind and consent, it seems that it will stand; and the husband and wife being after sued, they cannot say that she never was executor, and he doubted whether her *administering* without the husband's privity and assent, *though the will be not proved*, do not conclude her husband as well as herself from saying after in any suit against them, that she neither was executor, nor did ever administer as executor; yet perhaps such administration by the wife against the husband's consent, will, as against him, be a void act; and if *she, being made executrix during coverture, refuses, but yet the husband will administer*, she is bound during his life, though after his death she may refuse. See Went. Off. Executor, 202. to 205.

12. Husband and wife seized of lands in right of the wife, *levied a fine* to the use of themselves for their lives, and after to the use of the heirs of the wife; *proviso*, that it shall and may be lawful to and for the husband and wife, at any time during their lives, *to make leases for 21 years or 3 lives*, the wife being covert made a lease for 21 years. Adjudged a good lease against the husband, though made when she was a feme covert, and by her alone, by reason of the proviso. Godb. 327. pl. 419. Pasch. 21 Jac. B. R. Anon.

Jo. 137. pl.
3. Trin. 2.
Car. B. R.
Daniel v.
Ubley, S. C.
adjudged ac-
cordingly---

13. *Lands were devised by the baron to his feme, to dispose at her will and pleasure, and to give it to which of his sons she should please.* She marries another husband. Adjudged that the feme notwithstanding the coverture, might execute the power; for the son is in by the devisor. Noy 80. Daniel v. Upton.

Lat. 9. 39. & 134. Daniel v. Upley, S. C. adjudged accordingly; and ibid. 20. Arg. it is said that this power is collateral to the estate.

Devise

Devise of an annuity to a feme sole for life, with power to grant an annuity to any person she should name, and after she marries, yet this power continues in her, and is not transferred to the husband, and by her nomination she does not any ways charge the lands by virtue of any *interest arising from her*, but that is done by the will of the testator. Fin. Rep. 346. Pasch. 30 Car. 2. Gibbons v. Moulton.

14. If land was *devised to the feme, on condition to convey it to J. S.* there she has interest conditional, and to save the condition she may convey it during coverture; so *feoffment to a feme covert, upon condition to enfeoff J. S.* Admitted. Jo. 138. pl. 3. Trin. 2 Car. B. R. in case of Daniel v. Ubley.

15. If *feoffment be made to a feme covert upon trust, and confidence to convey it to J. S.* per Jones J. she cannot make feoffment; for the estate was absolutely in the feme, not subject to the condition, but in trust and confidence; so that without the baron's joining with her in a fine, her feoffment is void; and if it was by fine, it is voidable by the baron; but Doderidge and Whitlock J. were of opinion, that in that case a conveyance by her was good. Quære. Jo. 138. Trin. 2 Car. B. R. in case of Daniel v. Ubley.

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But if she is feoffee upon condition to convey it over, she shall be bound by her feoffment, because she was but an instrument. Arg. 2

Roll. Rep. 68. cites 11 H. 7. 3. — Arg. 2 Roll. Rep. 175. cites 34 E. 3. Cui in Vita.

A feoffment with *letter of attorney to the wife to make livery*, is good; but then she must make livery in the name of her husband. Arg. Godb. 389. cites Perk. l. 196. 199.

16. A *receipt given by the wife alone for a legacy bequeathed to her*, is not a sufficient discharge against the husband. Vern. 261. pl. 255. Mich. 1684. Palmer v. Trevor.

Nor can she dispose of it from the husband without his

concurrence, and such claimant ought to set forth by what act or deed he claims it, and her administrator ought to be made a party; and so it was ruled upon demurrer. Fin. Rep. 387. Trin. 30 Car. 2. Wall v. Eastmead & Hakes.

17. If feme covert *purchases lands without consent of the baron*, he may have *trover for the money*. Cumb. 450. Ruled at Guildhall, Trin. 9 W. 3. in case of Garbrand v. Allen.

Ld. Raym. Rep. 224. S. C. accordingly.

18. Feme covert may *plead alone in a criminal matter*; as if she was attainted of *felony*, she may plead a *pardon*; per Holt, Farr, 82. Mich. 1 Ann. B. R.

(L) What Things they both may do to charge the Feme after the Death of the Husband.

[1.] If a *recovery be in an assise sur disseisin against them*, *execution shall be against the feme after the death of her husband, as well for the damages as for the principal.* 39 H. 6. 45.]

So is trespass. See tit. Execution (T) pl. 2. cites 47 E. 3.

[2. If the baron and feme *have the same occupation*, and the baron dies, the feme shall be *charged by the statute of Gloucester, for the occupation, in an assise or trespass.* 39 H. 6. 45.]

Mod. 66. 3. Baron and feme levied a *fine sur concessit* of lands with
 pl. 14. warranty to W. The baron died. W. is ejected. The court
 S. C. & held, that covenant lies against the feme upon this warranty in
 S. P. agreed accordingly the fine by her, though she was covert at the time of the fine
 accordingly levied. Lev. 301. Mich. 22 Car. 2. C. B. Wootton v. Hale.
 by the counsel for the defendant,
 but insisted on a fault in the pleadings. — Ibid. 291. pl. 37. S. C. & S. P. agreed by
 the counsel of both sides, and also by the court. — Sid. 466. pl. 2. S. C. and in a note
 at the end says, it seems to be admitted by all that action of covenant lies upon the concessit in
 the fine without a deed. Quod nota. — 2 Saund. 177. S. C. held accordingly, that covenant lay
 against the feme.

[61] (L. 2) Bound by her own Act. By Relation.

1. IF feme sole commands *J. N. to make an obligation in her name*, and before the execution of it she takes baron, and after it is executed, it shall bind her; for she had power at the time of the command. Quære. Br. Coverture, pl. 50. cites 14 E. 4. 2.

2. Though the deed of a feme covert could not be binding, yet being relative to a fine, it gives an efficacy and operation to the deed, and is as conclusive as if she were a feme sole; per Holt Ch. J. in delivering the opinion of the court. 12 Mod. 161. Hill. 9 W. 3. Jones v. Morley.

(M) What Things a Woman may do alone to charge her Husband.

Fitch. Ac- [1. THE baron, in an account, shall not be charged by the receipt of his feme, unless it came to his use. 43 Ed. 3. 33.]
 count, pl. 28. cites S. C.

2. Per cur. gift of goods of the baron made by feme covert is good, if the baron agrees to it, or if he does not disagree, yet it suffices, and therefore the gift was to the feme covert; quod nota. Br. Done, pl. 4. cites 27 H. 8. 26.

Palm. 206. 3. Debt was brought by the husband upon a lease made by the feme
 S. C. and dum sola. After marriage that feme received the rent of the lessee,
 ibid. 210. who had no notice of the coverture, (by any thing which appeared)
 it was re- nor was there any countermand of the payment thereof to the
 solved by 3 feme. It was resolved, that this payment was as no payment,
 justices, but the baron may well demand and recover it again. Cro. J.
 Doderidge 617. (bis) pl. 7. Mich. 19 Jac. B. R. Tracy v. Dutton.
 being in the
 parliament, that the
 payment to the feme was void in law; and by Ley Ch. J. that notice of the marriage was
 not necessary.

2 Freem. 4. The wife received money due on a bond entered into by one to
 Rep. 178. her husband. The husband got judgment on the bond; but be-
 pl. 240. cause she usually received and paid money for him, it was ordered
 S. C. in that, he acknowledge satisfaction thereupon. Chan. Cases, 38,
 totidem ver- Mich.

Mich. 15 Car. 2. by the master of the rolls. *Seabourne v. Blackstone*.

5. The wife of *A.* receives 10*l.* to the use of *A.* and this comes to the use of her husband in a convenient or necessary way; although the husband did not command it, or consent afterwards, he is liable to this debt, and the count shall be of a receipt by the hands of the husband; such manner of count will serve in debt in this case. The reason is, the wife's contract is void, and it ought not to be alledged in the count, but the count ought to be as above; by the justices of both benches. *Jenk.* 4. pl. 5.

(M. 2) In what Cases she may take by Grant. [62]

1. IF an estate be made to a man's wife, *de novo*, it is not necessary to aver his assent; for it vests till he dissents; but where the wife had an estate before, an assent is necessary, because it cannot be divested by her acceptance of a new estate, unless he assent to the latter estate; per *Hobart Ch.* *J. Hob.* 204. pl. 257. *Trin.* 14 *Jac.* at the end of the case of *Swain v. Holman*.

2. Debt upon a penal bill, by which the defendant promised *K.* a feme sole, that as soon as a grant should be made to him of such an office, he would execute a bond to her for payment of 50*l.* per annum to her, during the joint lives of her and the said defendant. The office was granted to him, and she being afterwards married, her husband and she brought this action, setting forth this matter, &c. but that he had not sealed a bond to her dum sola, nor to the husband and her jointly after the marriage, &c. Upon demurrer the defendant had judgment, for though it was averred, that he had not sealed the bond to the wife whilst sole, nor to the plaintiffs after the marriage, yet it was not said that he had not sealed to her after the marriage, and this exception was held good per tot. cur. *Lutw.* 413. *Hill.* 3 & 4 *Jac.* 2. *Tonstall v. Williamson*,

(N) What Things a Woman may do without her Husband, [or may be avoided by him.]

[1.] IF a feme covert levies a fine, this will bar her, if her husband does not avoid it, during the coverture. * *Trin.* 10. 43. 18 *H.* 6. 27. † 17 *Aff.* 17.] * *Co.* 11 *Jac.* in *Mary Portington's* case.

† *Br.* Coverture, pl. 77. cites *S. C.* — and if the baron dies she shall not avoid it in scire facit. — *Br.* Fines levied, pl. 75. cites *S. C.* — *Fitzh.* *Estoppel*, pl. 135. cites *S. C.* and *Trin.* 17 *E.* 3. 52. — 7 *Rep.* 8. a. b. *S. P.* accordingly per cur. cites *S. C.* — See tit. Fines (T) per totum.

* Br. Fines levied, pl. 75. cites 10. 43. * 17 Aff. 17.]

S. C.—Br. Coverture, pl. 77. cites S. C.—Fitch. Estoppel, pl. 135. cites S. C.—7 Rep. 8. a. b. S. P. per cur Mich. 28 & 29 Eliz. in the court of wards, in the earl of Bedford's case, and the comusee shall not have the land; for by the entry of the baron the entire estate of the comusee is defeated, and the antient estate of the feme re-vested in her, and the baron seized of the entire estate as in right of his wife, and says, that with this agrees 17 E. 3. 52. b. 17 Aff. 17. 7 H. 4. 23. 2 R. 3. 20. 9 H. 6. 33.—Hob. 225. Hobart Ch. J. says, note a conflict of two laws of nature and equity, as it were, but the one is predominant; and yet the law of the land for necessity's sake of commerce and the like by a law of policy, makes bold with the law of nature in a special kind, and therefore allows a fine levied by the husband and the wife; because she is examined of her free will judicially by an authenthical person, trusted by the law, and by the king's writ, and so taken in a fort as a sole woman, as also when she comes in by receipt; but this being but a fiction of law, must not be extended beyond that, that the law has granted as a privilege. Nay more, if a woman covert levy a fine alone, as if she were sole, this shall bind her for the reason before given, that she shall not be received to say she was covert, though her husband shall, and may enter and restore the land to himself and his wife both.

[63]

Fol. 347. [3. Quære, if a feme covert suffers a common recovery, if this binds the feme after the death of the husband, if he does not avoid it during coverture.]

Br. Error, pl. 173. cites S. C. [4. If a feme covert appears to an action, and after is outlawed, her husband and she may reverse it; because it was without her husband. 18 Ed. 4. 4.]

Joinder in Action, pl. 88. cites S. C. that they ought to join to reverse it; because feme covert cannot sue without her baron.

5. If a man makes a feme covert his executrix, and devises the reversion to be sold by her, she cannot make a deed, and yet her sale is good without any attornment, nor can she levy a fine; and the reason seems to be, inasmuch as when the sale is made it passes by the testament, and not by the sale. Br. Devise, pl. 12. cites 19 H. 6. 23.

6. A feme covert bought goods for 10 l. the baron paid the 10 l. and took the goods; the vendor brought trespass; per Yaxeley, the sale is void, by reason that she who bought is a feme covert. But per Rede, the buying by her is good, because her baron agreed to it. Fineux contra; for a feme covert cannot do a thing which may turn to the prejudice of her baron, and contra of that which is for his advantage; for if I give goods to a feme covert, it is good if the baron agrees; but if a † feme covert buys a thing in a market it is void; for it may be a charge to the baron; but she may buy a thing to my use, and I after agree to it. Br. Contract, pl. 19. cites 21 H. 7. 40.

† S. P. Br. Contract, pl. 41. cites 20 H. 6. 22.

S. P. Br. Contract, pl. 41. cites 20 H. 6. 22.

7. And if I command my feme to buy things necessary, and she buys, this shall bind me by the general command, though I did not express to her what things are necessary. Br. Contract, pl. 19. cites 21 H. 7. 40.

S. P. per Fineux Ch. J. Br. Contract, pl. 41. cites Trin. 24 H. 7.

8. And if my feme buys a thing for my household, as bread, &c. and I have no knowledge of it, there, though it was expended in my house, I shall not be thereof charged. Quod nota bene. Ibid.

9. Baron

9. Baron and feme levied a *fine of the wife's lands to the use of themselves for their lives, remainder to the heirs of the wife, with a proviso for the husband and wife, at any time during their lives, to make leases for 21 years, or 3 lives, &c.* The wife, during the coverture, made a lease for 21 years; and it was adjudged a good lease against the husband, (though made by her alone while she was covert) by reason of this proviso. Godb. 327. pl. 419. Pasch. 21 Jac. B. R. Anon.

10. The baron being gone beyond sea, the feme levies a fine of her lands; the baron returns and enters into part. The question was, whether this had avoided the whole fine? and held that it had; for what act soever he doth in disaffirmance of the fine, shall avoid it. Freem. Rep. 396. pl. 515. Trin. 1675. Mayo v. Combes. 3 Keb. 477.
S. C. ad-
judged.

(N. 2) What Act of the Wife's shall be good with the Husband's joining.

1. **A** Feme covert is of a capacity to purchase of others, without the consent of her husband, but her husband may disagree thereto, and divest the whole estate; but if he neither agrees nor disagrees the purchase is good. But after his death, though her husband agreed thereunto, yet she may (without any cause to be alledged) waive the same, and so may her heirs also, if after the decease of her husband she herself agreed not thereunto. Co. Litt. 3. a. at the top. [64]

2. Warrant of attorney by baron and feme to deliver a lease upon the land, is merely void as to the wife. Yelv. 1. Pasch. 44 Eliz. B. R. Wilson v. Riche.

But a letter of attorney by them both to receive a le-

gacy bequeathed to the wife, is good, because the letter of attorney of the husband alone is sufficient. Goldb. 159. pl. 91. Hil. 43 Eliz. Huntley v. Griffith.

3. If a limitation be, that if a ring be tendered by a woman, that the land shall remain to her, she takes a husband, she and the husband tender the ring; this is a sufficient tender, and shall be intended the act of the wife. Arg. 2 Brownl. 67. Pasch. 9 Jac. C. B. in the case of Portington.

4. A bond was conditioned to pay 50*l.* to the plaintiff; memorandum, it is agreed before sealing, &c. that the wife may dispose of the 50*l.* in her life-time to whom she will, to be paid by the plaintiff accordingly, he being only trustee of the wife in the said obligation. In action against the husband after the wife's death, the defendant pleads that she with his consent made her will, and thereby bequeathed 30*l.* of the said 50*l.* to divers persons, and the rest to him, and made him executor, and after died, and so disposed of the said 50*l.* in her life. On demurrer to this plea, judgment was given for the plaintiff, for the 50*l.* ought to be paid to the plaintiff, notwithstanding the disposal. 2. Jo. 216. Trin. 34 Car. 2. B. R. Blunt v. Collins.

5. Where a legacy is given to a feme covert, on condition to *release* her interest in lands, she must release by fine. 9 Mod. 79.
10 Geo. Acherley v. Vernon.

(N. 3) Acting as a Sole in other Cases than as Feme Sole Merchant.

Chan. Cases
50. S. C.
at the Rolls,
says that
there ap-
peared some
probable
evidence
that the
husband
was not dead;

1. **FEME** as administrator to her husband, brought an action. The defendant brings a bill, suggesting that the husband is not dead but conceals himself, and pending the suit in equity, the feme got judgment at law, but the court granted an injunction, and directed an *issue* at law to try whether the husband was *dead or not*. N. Ch. R. 93, 16 Car. 2. Scott v. Reyner.

and so an injunction was granted, and a trial at law directed.

2. A feme covert who lived by herself and acted as a *feme sole*, gave a *warrant of attorney to confess a judgment*, &c. and afterwards moved to set aside the judgment, because she was covert; but the court would not relieve her, but put her to her writ of error. 1 Salk. 400 pl. 5. Mich. 10 W. 3. B. R. Anon.

3. A woman living separate from her husband and *passing for a widow*, was applied to by B. to lend him 100l. on a mortgage. She told him that she had only 50l. of her own, but that she could get 50l. more of a young woman, *which she did*, and acquainted B. thereof, and ordered the mortgage to be made to herself by a different name from that of her husband, and gave the young woman a bond for payment of the 50l. and interest, but by another different name. B. made several payments of the interest to the wife, but knew nothing of the marriage. The husband having notice of the mortgage, gets that and all the writings into his custody. On discovery of the marriage, a bill was brought by the person that lent the 50l. (and who in truth was servant to the wife at the time) either to charge the money on the mortgage or upon the person of the husband. The wife by her answer disclosed all this matter, and B. by his answer, and likewise on his examination as a witness, declared that the wife had told him that the young woman (the now plaintiff) was the person that advanced the 50l. The court agreed clearly, that the wife shall never be admitted by answer or otherwise, as evidence to charge the husband. But the master of the rolls said that this was perfectly a new case; for here she transacted the affair with B. and the plaintiff as a feme [sole,] and neither of them knew, or had notice of the marriage; and the husband himself (as was proved in the cause on some other occasions) *had given into the concealment of the marriage*, and therefore the court did allow of her evidence, as it was supported by what B. said, and thought upon the whole the evidence of the wife sufficient to prove 50l. part of this

[65]

money, to be the plaintiff's, not considered as a wife, but as she transacted and appeared throughout, as a feme sole, and therefore decreed to the plaintiff the 50*l.* with costs. Equ. Abr. 226, 227. pl. 15. Hill. 1719. Rutter v. Baldwin.

4. Where a feme *has reserved the power of her own estate*, and gave a note for payment of a debt of the baron's out of her own separate estate, to prevent an execution of his goods; she is to be considered as a feme sole, and she shall be bound. Ch. Prec. 328. pl. 249. Hill. 1711. Bell v. Hyde.

Gillb. Equ. Rep. 83. S. C. in totidem verbis.

(O) What Things a Woman may be *said to do* with her Husband.

[1.] If they are *disseisors*, the feme cannot take the profits with her husband, but the baron alone in his own right, and the right of his feme. 39 H. 6. 44. Curia.]

For it is but as a chattel, which is the baron's only. Br. Parnour,

&c. pl. 15. cites S. C. — Br. Maintenance de Brief, pl. 31. cites S. C. — Br. Parnour, pl. 24. cites 4 E. 4. 30. S. P. by Danby & al'. — But though feme covert cannot take the profits, yet the alledging the profits to be taken by the baron for him and his wife, was awarded good. Br. Parnour, &c. pl. 9. cites 22 H. 6. 35. — Ibid. pl. 15. S. P. — See tit. Disseisin, (D) (E) (F) (G).

[2. If baron and feme lease for years the land of the feme, this is the lease of both. 7 H. 4. 15.

Br. Baron and Feme, pl. 31. cites

S. C. but S. P. does not appear. — Fitzh. Briefs, pl. 227. cites S. C. but S. P. does not appear.

(O. 2) Actions by Baron for criminal Conversation with the Feme, and Pleadings.

1. LICENCE by husband to the wife to lie with another man, cannot be pleaded in bar to an action of trespass by the husband, nor that she was a *notorious lewd woman*; but these matters may be given in mitigation of damages. 12 Mod. 232. Mich. 10 W. 3. Coot v. Berty.

[66]

2. If adultery be committed with another man's wife *without any force, but by her own consent*, the husband may have assault and battery, and lay it vi & armis; and yet they shall in that case punish him below for that very offence; for an indictment will not lie for such an assault and battery; neither shall the husband and wife join in an action at common law, and therefore they proceed below either civilly, that is, to divorce them, or criminally, because they were not criminally prosecuted above; and the true action for the husband in such case is a *special action, quia the defendant uxorem rapuit*, and not to lay it per quod consortium amisit; per Holt Ch. J. and per cur. accordingly; for that

2 Salk. 552. pl. 13. Gellard v. Rigault, S. C. & S. P. by Holt Ch. J.

that the offence is not merely spiritual. 7 Mod. 81. Mich. 1 Ann. B. R. in case of Rigault v. Gallifard.

(P) What Things done by Baron and Feme shall bind the Feme.

In office of
novel dis-
seisin against
several, one

answered as tenant of the tenements, and vouched to warranty a man and his wife who were named in the writ, and were ready to have warranted. Herle said that the feme in this case cannot be received to warrant, unless she be examined, and we have no warrant to examine her; whereupon he bid the tenant to answer, and so he did. Pasch. 5 E. 3. b. pl. 11. — None can examine a feme covert without writ. 2 Inst. 673.

See tit.
Fines (T)

[2. Baron and feme *levy a fine*; this will bar the feme. 18 Ed. 4. 12.]

Sid. 11. pl.
7. Mich.
12 Car. 2.

[3. If baron and feme *suffer a common recovery*, this binds the feme; for she is examined on this. Co. 10. 43. † 23 H. 8. f. 37. Com. EYER AND SNOW. 515.]

C. B. it was
said by the

serjeants, that feme covert was not to be privately examined upon suffering a common recovery, though she must be on a fine. But Bridgman Ch. J. said that the law is, that she should be privately examined in both cases; and though your practice has been as you say, (and so was the opinion of Roll Ch. J.) yet it is good to be advised, that the want thereof may be corrected; but however the feme was permitted to suffer the common recovery without private examination. — Sid. 322. pl. 14. Mich. 18 & 19 Car. 2. B. R. at the end of the case, in a note of the reporter, is a *quære* how a feme covert can be barred unless by fine, because she is not examined upon a common recovery. — And 5 Mod. 210. Pasch. 8 W. 3. in case of Stokes v. Oliver, it is said that it may be a question whether a feme covert can be barred by any act of her own besides a fine, because she is not examined upon a common recovery.

On all recoveries there was a writ to examine feme coverts, and the first mention of such examination is 43 E. 3. 18. but now it is wholly disused in common recoveries, though it still remains in fines. Pig of Ragoy. 66.

† This seems to intend Br. Recovery in Value, pl. 27. which cites 23 H. 8.

* Sty. 320. Hill. 1651. S. P. by Roll Ch. J. in case of Lockoe v. Palsryman.

It shall not
be inrolled
because it is
not the deed
of the feme.

[4. Baron and feme *acknowledge a deed to be inrolled*; this does not bind the feme, because she is not examined by writ. Co. 10. 43.]

Br. Coverture, pl. 47. cites 7 E. 4. 5. — Br. Faits inrolled, pl. 11. cites S. C. — Fitzh. Estoppel, pl. 68. cites S. C. — Br. Faits inrolled, pl. 14. cites 29 H. 8. that deed of baron and feme shall not be inrolled, in C. B. but for the baron only, and not for the feme, by reason of the coverture; nor shall she be bound with her baron in statute-merchant, &c. — But if baron and feme make a deed inrolled of land in London, and acknowledge before the recorder and an alderman, and the feme is examined, this shall bind as a fine at common law by the custom, and not only as a deed. Ibid. pl. 15. cites S. C. — Br. N. C. pl. 109. cites S. C. and 7 E. 4. 5. and 32 H. 8. 171. — See 2 Inst. 673. S. P.

† [67]

Br. Obliga-
tion, pl. 74.
cites S. C.
— Br. Co-
verture, pl.
76. cites
S. C. but
adds no
quære.

5. If the baron and feme are bound in an obligation of 100l. for a release made to them of the land *de jure uxoris*, and the baron dies, this obligation shall bind the feme, because it was made for her release, which is a benefit to her; per Beiknap. *Quære*, for it was not adjudged. Br. Baron and Feme, pl. 77. cites 44 E. 3. 33.

6. If a man leases to baron and feme for years rendering rent, and dies, the feme shall be bound by it; contrary of other collateral covenant. Br. Baron and Feme, pl. 78. cites 45 E. 3. 11.

S. P. Br. Covenant, pl. 6.

7. *Quid juris clamat by baron and feme against tenant for life, upon fine levied of the reversion, who came and said, that saving to him the advantage of his deed of lease, which he shewed forth, which was without impeachment of waste, he is ready to at-torn; and the advantage to him was suffered, and all entered in the roll, notwithstanding that the feme plaintiff was covert; but this was in a manner by agreement, and not by express rule.* Br. Coverture, pl. 10. cites 45 E. 3. 11.

8. *Lease made by baron and feme shall be said the lease of both, till the feme disagrees, which she cannot do in the life of the baron, and waste lies by both.* Br. Agreement, pl. 6. cites 3 H. 6. 53.

9. *A man was infeoffed to the use of a feme sole, who takes an husband. They both for money sell the land to B. who pays it to the wife, and she and her husband do pray the feoffee to make estate to B. Afterwards her husband dies. Now, by the chancellor and all the justices, she shall have aid against the first feoffee by subpoena, to satisfy her for the land; and if the 2d feoffee were consulant, a subpoena shall be against him for the land; for all that the wife did during her coverture (as they said) shall be taken to be done for fear of the husband.* Cary's Rep. 18, 19. cites 7 E. 4. 14. Subpoena, Fitzh. 6.

Br. Con-science, &c. pl. 13. cites S. C. — Br. Feoff-mental Uses, pl. 41. cites S. C.

10. *Husband and wife, seised of lands to them and the heirs of the husband. He covenanted, in consideration of 20l. that he and his wife would suffer a recovery thereof by writ of right, according to the custom of London, which is as binding as a fine at common law, and that it should be to the use of the recoverers, until they (the baron and feme) had made a good and sufficient lease for 40 years, &c. and after to the use of the husband and wife, and to the heirs of the feme. The lease was made accordingly, and afterwards the husband died. All the judges were of opinion, that the wife shall not avoid this lease, because her former estate was gone and extinguished by the recovery; and judgment accordingly; and the reporter says that all the justices of B. R. were of the same opinion.* Dyer 290. a. pl. 61. Trin. 12 Eliz. Luther v. Banbong.

S. C. cited per cur 2 Rep. 57. b. — Jenk. 238. pl. 17. S. C.

11. *Fine by E. to the use of himself for life, remainder to his wife that should be at the time of death, for life; remainder to the son of E. in tail. E. took to wife A. A fine levied by E. and A. his wife, who afterwards survived him, and other uses declared, is no bar to her, because it was uncertain who would be the person; but had the person been certain, there perhaps, notwithstanding it was but a possibility, it might have been a bar; per Walmsley J. Cro. E. 826. pl. 31. Pasch. 41 Eliz. C. B. Wells v. Fenton.*

Mo. 634. pl. 869. S. C. says that Warburton, Walmsley, & tota curia held, that she was barred by estoppel; but that Anderson

and Kingmill held, that the fine had extinguished the uses by prevention. — Pf. C. 562. b. 563. Arg.

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12. A. having three daughters, B. C. and D. intails his land upon them. Afterwards C. married, and being a feme covert, *agreed with consent of her husband to take 1000l. in consideration of extinguishment of her right as coheir.* The judges by their certificate held it to be no bar to her. Toth. 162. cites Trin. 7 Jac. Dockwray v. Pool.

13. A single woman did agree to have a moiety of land, and after marriage subscribed her name with her husband to a latter agreement though feme covert. Decreed in 10 Jac. lib. B. 25. or 250. Toth. 160. Randall v. Tynny.

14. M. a feme before her marriage with A. conveyed lands to trustees with A.'s privity, in trust, to pay the rents and profits to her sole and separate use for her life; and after to such uses as she, whether sole or covert, should by her last will limit and appoint; and for want of such appointment, then to her own right heirs for ever. After the marriage A. mortgaged the land to the plaintiff for 500 years, to secure 1000l. A. and M. join in a fine, and both declared the uses to be to the plaintiff for securing his principal and interest, the remainder to the right heirs of A. M. insisted that she was compelled by duress to join in the fine, and that the mortgage was fictitious only, and in trust for A. in order to defraud her; and it was argued that this was a naked power without any interest, and so could not be barred by the fine; but lord chancellor c contra, and decreed the trustees to convey to the plaintiff, but without prejudice to any future bill that may be brought for discovery of the fraud or force. Cases in Equ. in lord Talbot's time. 41. Mich. 1734, Penne v. Peacock.

(P. 2) Incumbrances by them of the Estate, &c. of the Feme.

1. A Feme covert by duress joins in a lease with her husband, she shall be bound by it; per Manwood J. 3 Le. 72. pl. 110. Hill. 20 Eliz.

2. Baron and feme seised in the right of the feme, mortgaged by deed for 300l. and covenanted to levy a fine for further assurance, and if the baron and feme, or either of them, or their heirs, executors, &c. did pay, &c. then the said fine to enure to the baron and feme, and the survivor, and after to the right heirs of the baron. A fine was levied, and the monies not paid at the time, but borrowed more money, and by deed confirmed the mortgage for the further sum. The baron died; his heir, an infant, decreed the feme to pay one-third, and the infant heir two-thirds. Chan. Rep. 218. 13 Car. 2. Rowell v. Walley.

3. A. promises to leave his wife 400l. if she will join in sale of her lands, and let him have the money to trade with. She joins, and six months after he gives bond to a stranger to pay his

his wife 300l. after his death; per Hale Ch. J. this bond is not fraudulent against creditors. 2 Lev. 148. Mich. 27 Car. 2. B. R. Clerk v. Nettlehip.

4. Jointress paying off a mortgage was decreed to *hold over* till she or her executor be satisfied, and interest to be allowed her. Chan. Cases 271. Hill. 27 & 28 Car. 2. Cornish v. Mew.

5. A. and his wife feised of lands in the right of the wife by fine and deed, *mortgages* them for 340l. which was not paid at the day, but 200l. *part was paid* afterward, and then A. *borrowed other money* of the same mortgagee. The payment of the 200l. was indorsed on the mortgage deed. The wife, in presence of A. made account of what was due on the first and second loan, for both, by agreement, were to be on security of the mortgage. The wife died but *no fine levied on the second loan*, and therefore objected, that neither the wife's nor A.'s consent should bind the heir; but Finch C. contra; for the mortgagee has good title in law, and as much equity to the money as the heir has to the land. 2 Chan. Cases 98. Pasch. 34 Car. 2. Raufon v. Sacheverell.

Vern. 41. pl. 40. Raufon v. Sacheverell. S. C. decreed accordingly.

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6. Where the wife *joined in a fine* for concessit of her *jointure*, being houses burnt down in the fire of London, in order to a mortgage or security to raise 1500l. to rebuild them, it is not an absolute departure with her interest; but there is a *resulting trust* for her when the security or mortgage is paid, to have her estate again, as if it had been a mortgage on condition, and the money paid at the day. 2 Chan. Cases 98. Pasch. 34 Car. 2. Brond v. Brond, and *ibid.* 161. Hill. 35 & 36 Car. 2. Broad v. Broad.

A deed was made between the consuee and the husband, wherein the husband covenants to pay the mortgage money, viz. 1500l. with interest, and

the equity of redemption is limited to the husband and his heirs, but *the wife is no party to the deed*. The husband *lays-out* 3000l. in building, and dies. Ld. Nottingham had decreed the redemption to the wife, and now North, keeper, of the same opinion; because she was no party to the deed, which was for 99 years if the husband lived so long, and she being a *jointress*, there rests a reversion in her which naturally attracts the redemption; and had the cause come originally before him, he would have decreed it clear to the wife, the husband having covenanted to pay the money. Vern. 213. pl. 211. Hill. 35 & 36 Car. 2. S. C. by the name of Brend v. Brend. — This fine did not destroy her jointure, but *only enured to a particular purpose* to raise this term, and she shall have the rent, and it shall not be subject to the debts or charges made since her jointure, the levying thereof being upon an agreement, that she should have her jointure out of the reserved rent of the houses. Mich. 1 Jac. 2. B. R. Skin. 238. pl. 2. Anon. seems to be S. C. — Kin. Rep. 254. Brend v. Brend, is not the S. C.

7. The husband gave a voluntary bond after marriage to make a jointure of such value on his wife. The husband accordingly makes a *jointure*. The wife gives up the bond. The jointure is evicted. The jointure shall be made good out of the husband's personal estate, there being no creditors in the case, and the delivery up of the bond by a feme covert could no ways bind her interest. Vern. 427. pl. 402. Hill. 1686. Beard v. Nuthall.

8. A feme covert agrees to sell her inheritance, so as she might have 200l. of the money secured to her. The land is sold, and the money put out in a trustee's name accordingly; this money shall

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shall not be liable to the *husband's debts*, nor shall any *promise by the wife* to that purpose, subsequent to the first original agreement, be obliging in that behalf. 2 Vern. 64, 65. pl. 58. Trin. 1688. Rutland v. Molineux.

S. C. cited
per Ld. C.
Cowper.
Wms.'s Rep.
265, 266.
Mich. 1714.
In case of
Tate v. Auf-
stin.—MS.
Tab. tit.
Mortgage
(D) cites 8
Jac. 1702.
S. C.—S. C.
cited G.
Equ. Rep.
68, 69. by
Ld. Chan-
cellor,
Pasch.
9 Ann.

9. *Feme joins with baron in a mortgage of her own inheritance* to raise money to buy a place for the baron; baron covenants in the mortgage to pay the money (4500l.) and on payment thereof by proviso the term is to cease. The mortgage is afterwards assigned, and the proviso is, that on payment by them, or either of them, the term to be assigned, as they or either of them shall direct. Baron, soon after the mortgage, promised his wife to apply the profits of his place to pay it off. *Baron pays it off, and takes an assignment in trust for himself, and devised it to a second wife.* The son and heir of the baron, and first wife, brings a bill to have the mortgage assigned to him. Denied relief in canc. but on payment of principal, interest, and costs. But in dom. procer. decreed the mortgage to be assigned to the heir. 2 Vern. R. 437. pl. 402. Pasch. 1702. Earl of Huntingdon v. Countess of Huntingdon.

10. Baron and feme mortgaged his wife's estate, and baron covenants to pay the money, but the equity of redemption was reserved to them and their heirs. Baron died, and made J. S. executor; per cur. the baron having had the money is, in equity, the debtor, and the land is to be considered but as additional security, and so decreed it according to the judgment in dom. proc. in the case of Ld. and Lady Huntington. 2 Vern. 604. pl. 542. Hill. 1707. Pocock v. Lee.

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In this case
the husband
by his will
gave several
charities out
of his per-
sonal estate,
and died
indebted

11. The wife joined with her husband in a fine to raise 400l. to equip him as an officer of the army. The husband dies. Per cur. this must be taken to be a debt due from the husband, and to be paid out of his personal estate if he be able; but all other debts shall be paid first. 2 Vern. 689. pl. 614. Mich. 1714. Tate v. Austin.

by simple contract. The assets were not sufficient to pay all. Ld. C. Cowper held this mortgage to be a debt of the husband's, and that the wife, by consenting to charge the land with it, does not make it less his debt than it was before; but decreed, that all other debts should be preferred to this, and that this be preferred before legacies, though to a charity. Wms.'s Rep. Mich. 1714. S. C.

(Q) What Actions the Baron may have alone, without his Feme, yet in the Right of his Feme.

Br. Baron
and Feme,
pl. 57. cites

[1. THE baron may have an action alone upon 5 R. 2. for entering into the land of the feme. 38 H. 6. 3. adjudged.]

S. C. for nothing is to be recovered but damages only. — Br. Action sur le Statute, pl. 17. cites 38 H. 6. 4. S. C. & S. P. accordingly; but Brooke says quære, whether he may upon the statute of 8 H. 6. and says, it seems that he may, because he shall recover nothing but damages in the one case nor in the other, and not any land, and therefore it is all one, as it seems. — Thal. Dig. 30. lib. 2. cap. 5. f. 17. cites S. C. to which agrees the opinion of Pasch. 4 E. 4. 14.

[2. He

[2. He shall have a *quare impedit* alone. 38 H. 6. 3. b. agreed. * Br. Quare Impedit, pl. 8. cites S. C. Contra * 28 H. 6. 8.]

that in qua. imp. the plaintiff counted that A. was seized of the advowson as of fee, and he took A. to wife, and the church voided, and he presented in jure of A. and had issue, and A. died, and the church voided again, and he presented; and per cur. because the *second presentment is not alleged in jure uxoris*, therefore ill; whereupon he amended his count. Brook says, *quare librum*. Fitzh. Quare Impedit, pl. 85. cites S. C. and judgment was prayed of the count, because he did not declare that he and his wife presented, but only that he in jure uxoris presented, whereas the presentation ought to have been by both; for had she been alive, he ought to sue in both their names, and so was the opinion of the court, and thereupon he amended his count. But Fitzherbert says *quare*; for that it has been adjudged, that he shall have action alone, &c. Fitzh. Joinder in Action, pl. 13. cites S. C. says, he ought to join the feme in the action, otherwise the writ is not good, and that so was the opinion of the whole court.

The baron may have *quare impedit* without his feme; for it is in a manner personal. Br. Paragur, &c. pl. 24. cites 4 E. 4. 30.

In *quare impedit* the feme may join. Heth. 144. Trin. 5 Car. C. B. per Hutton, and yet the avoidance goes on to the executors of the baron. Litt. 285. S. P. by Hutton. Roll. Rep. 359. pl. 11. Pasch. 14 Jac. B. R. per Coke Ch. J. They shall join in qua. imp. per tot. cur. Bulst. 110. Pasch. 9 Jac.

If a next avoidance be granted to baron and feme, the baron shall have action alone; per Hutton and Yelverton, (absentibus aliis) Lit. Rep. 13. Hill. 2 Car. in C. B. obiter. And see ibid. 375. Arg. S. P. Br. Baron and Feme pl. 28. cites 50 E. 3. 13. because *nothing is to be recovered but the presentment, and not the advowson*; but per Holt, *assise of darrein presentment* shall be brought by both; for this is a mixed action, and the *advowson shall be recovered*; but in *quare impedit*, the presentation or damages. S. P. because the writ to the bishop against him shall not bind the feme who is not party, and also it is aided by the statute of Westminster. Br. Quare Impedit, pl. 41. cites 50 E. 3. 13.

A writ of *quare impedit* was brought by the baron alone, where he had the advowson in right of his feme, and adjudged a good writ. Thel. Dig. 29. lib. 2. cap. 5. f. 12. cites Trin. 50 E. 3. 13. and that so it was adjudged, Mich. 14 H. 4. 12. where it was said by Thirning, that they ought to join in writ of right of advowson, and in assise of darrein presentment; and that the opinion of the court was, Trin. 28 H. 6. 9. that they ought to join in *quare impedit* also, and says, see 7 H. 7. 2. The husband alone may have *quare impedit*; per Dyer. Ow. 82. Pasch. 4 & 5 P. & M. Bulst. 14. S. P. accordingly, per cur. Mich. 10 Jac.

[3. So in trespass for taking charters of the inheritance of the feme. † 38 H. 6. 4. † 8 H. 5. 9. b. adjudged.]

[b. 4. a. S. P. obiter.] † Fitzh. Brief, pl. 890. cites S. C. the writ was awarded good, though brought only by the baron. Thel. Dig. 29 lib. 2. f. 16. cites Hill. 8 H. 5. 9. and ibid. L. 17. cites 38 H. 6. 4. S. P. so agreed by Fortescue. See (R) pl. 1. and the notes there.

[4. So in a writ of *forger of false deeds* of the inheritance of the feme. 38 H. 6. 4. Dubitatur.]

6. 3. but S. P. does not appear there, though in the Year-book, 38 H. 6. 4. a. in pl. 9. which begins in fol. 3. b. the S. P. is asserted and denied. Thel. Dig. 30. lib. a. cap. 5. f. 18. cites S. C. that it was said, that they shall join in writ of *forger of false deeds*.

[5. In all cases where the feme shall not have the thing when it is removed, neither alone to herself, nor jointly with her husband, but the baron only shall have it, there the baron alone, without his feme, shall have an action to recover it, as in the cases aforesaid.]

[6. The baron shall have *trespass* alone for a trespass upon the land of his feme. § 38 H. 6. 3. b. 7 Ed. 4. 6.]

In the case which he has in right of his wife, without naming the wife; for *nothing shall be recovered but damages*, and the release of the baron is good bar. Br. Joinder in Action, pl. 7. cites 43 E. 3. 8. and concordat the same year, fol. 14. For the baron may release alone. Br. Joinder

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In Action, pl. 7. — Thel. Dig. 29. lib. 2. cap. 5. f. 14. cites S. C. and says that so it was adjudged the same year, fol. 16 and 26. *de domo fracta & maronio inde capto*, which he had in jure uxoris, that the action was well brought by the baron alone. — Br. Baron and Feme, pl. 16. cites S. C. accordingly.

Action of trespass quare clausum fregit was brought by baron and feme, and Pollersfen Ch. J. held that the feme could not be joined, though it was her land. But Ventris J. e contra; for this action will survive, and they have election either to join or to bring it alone. Adjournatur. 2 Vent. 195. Trin. 2 W. & M. in C. B. Bright v. Addy.

§ Br. Baron and Feme, pl. 57. cites S. C. — The feme shall not join, for damages shall be recovered in lieu of profits. Het. 114. by Yelverton, cites 4 E. 4. — Litt. Rep 285. S. C. cited by Yelverton. — In trespass they may sever: per cur. Bulst. 21. Pasch. 8 Jac. Anon.

Of trespass done in the land of the feme, the baron may have trespass alone; for if he releases, or recovers, and dies, the feme shall not have action. Per Finch. Br. Baron and Feme, pl. 22. cites 47 E. 3. 9. — Br. Baron and Feme, pl. 50. cites 15 E. 4. 9. S. P.

Trespass may be brought by baron and feme, *that he broke the close of the feme dum sola fuit*. Br. Baron and Feme, pl. 69. cites 21 H. 6. 30. — The baron may have trespass without his feme; for it is in a manner personal. Br. Parnor de Profits, pl. 24. cites 4 E. 4. 30. — In trespass quare clausum fregit they ought to join, by the clear opinion of the whole court; so that it shall be intended here, that they are jointenants, and judgment accordingly. Bulst. 110. Pasch. 9 Jac. Maynard v. Tow.

And so he shall, where he and his wife had brought a *cui in vita*. [7. The baron alone may have a *decies tantum* for taking money in an *assise* brought by him and his wife. 40 Ed. 3. 33. b. adjudged. Nota, this is a popular action. But other-ways it is e contra.]

Quod nota bene. Br. Joinder in Action, pl. 19. cites 7 H. 4. 2. — Br. Baron and Feme, pl. 30. cites S. C. & S. P. accordingly. — Thel. Dig. 29. lib. 2. cap. 5. f. 11. cites Trin. 40 E. 3. 33. S. P. and says that such writ was abated, Pasch. 43 E. 3. 16. 35. which was brought by the baron and feme; and that writ brought by the baron alone was adjudged good. Mich. 7 H. 4. 2. Br. Baron and Feme, pl. 17. cites 43 E. 3. 16. S. P.

But where the baron and feme make a lease for years of the land of the feme, the baron alone may have writ of debt for the arrearages of the rent, &c. 8. Where the baron himself demises the land for years, which he has in right of his feme, he may maintain action of waste without his feme; because his lessee cannot disable the estate of his lessor. Thel. Dig. 30. lib. 2. cap. 5. f. 31. cites 4 E. 3. It. Darby, Brief 747.

Thel. Dig. 30. lib. 2. cap. 5. f. 25. cites Pasch. 7 E. 4. 6.

9. For a battery of the feme before the coverture, they shall both join in the action; but quære of a battery after the coverture. Br. Joinder in Action, pl. 54. cites 22 Aff. 87.]

[72] 10. He who is seised of a seignior of homage, fealty, escuage, rent, and suit of court in jure uxoris, may avow the taking of the distress for all those services, except homage, in his own name, without naming his feme, though he has no issue by her. Br. Distress, pl. 33. cites 27 Aff. 51.

Br Petition, pl. 17. cites S. C. accordingly. — Br. Chattels, pl. 26. S. P. and cites S. C. and says that therefore it is a chattel vested in the baron in jure proprio. 11. Petition may be made by the baron alone, where he is in the land by reason of a statute merchant made to his feme when she was sole, and they both may join if they will, but the suit is good by him alone, because the thing is only a chattel real, which the baron may give or forfeit; quod nota. Br. Joinder in Action, pl. 61. cites 37 Aff. 11.

Says that therefore it is a chattel vested in the baron in jure proprio.

12. Upon a *contract made by the baron and feme*, they cannot join in action of debt, notwithstanding that it be *for the land of the feme sole*. Thel. Dig. 30. lib. 2. cap. 5. f. 23. cites Trin. 48 E. 3. 18.

13. In *waste*, if the *baron and feme* seized in *jure uxoris lease for years*, the baron and feme ought to join in waste, for otherwise the writ shall abate. Br. Baron and Feme, pl. 31. cites 7 H. 4. 15.

Br. Joinder in Action, pl. 21. cites S. C. And so it seems, that during

the life of the baron it shall be said the lease of both.

14. The baron and feme may join in appeal of *rape of the feme*, for he cannot have it without the feme. Br. Baron and Feme, pl. 34. cites * 8 H. 4. 21. per cur. But see elsewhere the baron brought the appeal alone. 1 H. 6. 1. 11 H. 4. 13. and 10 H. 4. Fitzh. Corone, 128.

* They shall join. Thel. Dig. lib. 2, cap. 5. f. 28. cites S. C. and says it appears so by

the opinion there. — Where a *personal tort* is done to the wife, the baron and feme ought to join in actions as for battery, &c. per Coke Ch. J. Roll. Rep. 360. in pl. 11. Pasch. 14 Jac. B. R. — S. P. accordingly, by Richardson Ch. J. because the feme shall have the action if she survive. Litt. Rep. 285. Trin. 5 Car. C. B. — He may have action alone for *beating his wife*. 8 Mod. 26. Hill. 7 Geo. 1. Read v. Marshall.

15. Where the *baron and feme* had recovered damages in writ of *cofinage*, the baron alone without his feme was received to maintain writ of debt for the damages. Thel. Dig. 30. lib. 2. cap. 5. f. 22. cites Hill. 16 H. 6. Brief, 939.

16. The baron may have *conspiracy* and the like without his feme, for it is in a manner personal. Br. Parnor de Profits, pl. 24. cites 4 E. 4. 30.

Case in nature of conspiracy was brought by husband and

wife against J. S. for that he falsely and maliciously imposed upon them the crime of felony, and laboured to indict them; it was held that the action was not well brought, because they cannot join to the tort done to the baron. But if it had been for conspiracy to indict the wife, they might join well enough, and three justices were of that opinion; but Crooke J. e contra. Jo. 440. pl. 7. Trin. 15 Car. B. R. — Cro. C. 553. pl. 8. Dalby v. Dorthall, S. C. Berkley J. held that it was a several wrong, and therefore they could not join; but Crooke J. e contra, because it was grounded upon one intire record by which both were prejudiced, and they may join if they will, or the husband only may have the action for it, that he was damnified; wherefore ceteris absentibus, adjournatur. — Mar. 47. pl. 75. Trin. 15 Car. Anon. S. P. and seems to be S. C. and Crooke J. was of opinion as above, but the whole court was against him.

17. Upon *bailment* made by them two before the *coverture*, they cannot join. Thel. Dig. 30. lib. 2. cap. 5. f. 26. cites Mich. 8 E. 4. 16.

18. *Bill of attachment* was brought by the warden of the Fleet, by name of J. N. warden of the Fleet, and it is good, notwithstanding he be warden in *jure uxoris*, &c. and his feme shall not be named with him in action personal; for when the court commands him to do his office, &c. they do not say warden of the Fleet in *jure uxoris*, but only warden of the Fleet. Br. Bille, pl. 16. cites 9 E. 4. 40.

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19. *Rescous* was brought by the baron and feme, of *rescous made by the lord in right of his feme*; and it was argued that the baron alone ought to have the action, and awarded that the action is well brought in name of both; quod nota. And per Littleton, it

Br. Joinder in Action, pl. 36. cites S. C. — S. P. by Dyer, Pasch.

4 & 5 P. is well brought also in the name of the baron only. Br. Baron & M. Ow. and Feme, pl. 50. cites 15 E. 4. 9.

82.—The husband distrained for arrears of rent due to the wife *dum sola*; rescous was made husband alone may bring this action, or may join his wife if he please; but for a debt due to the wife *dum sola*, they must both join in the action. Moor 422. pl. 584. Mich. 37 & 38 Eliz. Feather v. Plasket. — Cro. E. 459. (his) pl. 3. S. C. adjudged; for it is a tort done to the baron, for which he may sue alone or join her with him, because it arises on a duty due to her before the coverture, but it is at his election.

Het. 160. 20. Where an obligation is made to a woman who takes husband, Arg. S. P. the wife ought to join with the husband in the action; but if the obligation be took from the husband, he alone shall have the action for the obligation, because he may dispose of it. Litt. Rep. 375. Arg. cites 7 H. 7. [but I do not observe that point any where in that year.]

4 Le. 88. 21. Baron brought an action for the battery of his wife, *per* pl. 187. *quod negotia sua infecta remanserunt*, and had judgment to recover. Pasch. 28 Cro. J. 502. pl. 11. says a precedent was shewn in 28 Eliz. B. R. Eliz. C. B. Cholimley v. Cholimley's case. Conge, seems to be S. C. and is of an action brought by the husband of a battery done to the wife, and the plaintiff had judgment; but nothing is mentioned of the *per quod negotia*, &c. — Cro. J. 502. pl. 11. says that another precedent was cited to be in the exchequer in Doyl's case, that such an action was adjudged good.

An action by baron and feme against the defendant, for goods taken out of their possession. The wife was administratrix. 22. Where the feme is administratrix, the suit must be in both their names, and they shall be named administrators; for by the intermarriage the husband hath authority to intermeddle with the goods as well as the wife; but in the declaration *all the special matter must be set forth*; per Wray Ch. J. and so some said is the Book of Entries, that both of them shall be named administrators. Godb. 40. pl. 44. Hill. 28 Eliz. B. R. Prideaux's case.

Mr. Raymond moved in arrest of judgment, because having been in their possession, the wife should not be joined, and naming her executrix might have been left out of the case; and cited a case 10 W. 3. where the wife was executrix, and the defendant promised the husband that if he would forbear, he would pay; and the wife was not joined in that case. Per Powell J. in the case of baron and feme, it is certain the law does give the goods of the wife to the husband, but not when she is administratrix, because she has them *in autre droit*, and the husband here cannot bring an action on the judgment. Judgment for the plaintiff. 11 Mod. 177. pl. 2. Trin. 7 Ann. B. R. Thomson v. Pinchell.

So also must be a replevin for those goods in both their names. 23. In action for goods which the feme has as executrix, they must join, to the end that the damages thereby recovered may accrue to her as executrix in lieu of the goods. Went. Off. Ex. 207.

Went. Off. Executor, 207.

Brownl. 205. Huggins v. Butcher, S. C. but seems only a translation of Yelv. 24. In battery the plaintiff declared, that on such a day the defendant assaulted and beat his wife. This action was brought by the husband after the death of his wife, and it being a personal wrong, is dead with the person; and if she had been living, the husband alone could not have the action, because damages must be given for the tort offered to the body of his wife. Quod
suit

Baron and Feme.

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fuit concessum. Yelv. 89. Trin. 4 Jac. B. R. Higgins v. Butcher. —Noy 18. Higgins's case, S. C.

& S. P. per cur. as to the action being gone; and by Tanfield, had she been living, she ought to have joined in the action. —Where the wife dies of the battery, the baron cannot have action on the case, because it is criminal, and of an higher nature. Freem. Rep. 224. pl. 231. Pasch. 1677. C. B. Smith v. Sykes. —And it was urged by Serj. Barrel, that if a man beats a feme covert, the husband and wife ought to join; and if the husband dies, it shall survive to the wife; but that the action shall not survive to the husband if the wife dies, and he cited 37 H. 6. 7. But curia advisare vult.

25. A feme sole had *right of common* for her life, and marries B. who being hindered in taking the common, brings action in his own name, without naming his wife. The court held the action well brought, it being only to recover damages. 2 Bulst. 14. Mich. 10 Jac. Baker's case. Litt. Rep. 284, 285. Trin. 5 Car. C. B. Costrell v. Moore, the husband and wife joined in the action; and after verdict for the plaintiff it was moved in arrest, that they could not join in the action; and Richardson Ch. J. thought they could not join, because the wife could not have the damages if she survive; and Yelverton was of the same opinion. —Het. 143. S. C. in *to- tidem verbis*.

26. The queen leased a house to C. who *covenanted for himself and his executors and assigns to repair*, and leave the house repaired. Afterwards the queen *granted the reversion to B. the plaintiff and his wife, and to the heirs of B. in fee*; and for not repairing, B. alone brought covenant. Resolved, that the action being personal, and damages only recoverable, *the husband may alone have the action, or join the wife with him.* Cro. J. 399. pl. 6. Pasch. 14 Jac. B. R. Bret v. Cumberland. Cro. J. 521. pl. 5. Hill. 16 Jac. B. R. the S. C. but S. P. does not appear. —Godb. 276. pl. 39. S. C. but S. P. does not appear. —Poph. 196. S. C. but S. P. does not appear. —3 Bulst. 163. S. C. and the whole court were clear of opinion (except Haughton) that the action was well brought by the husband alone, and judgment accordingly. And by Coke Ch. J. and Doderidge, he might have joined her with him if he would. —Roll. Rep. 359. pl. 11. S. C. says it was held by Coke, Doderidge, and Haughton, that the husband alone may have the action without the wife; for what the baron alone may discharge or dispose of, he may alone recover without joining his wife in the action.

27. Trespas of assault, and *wounding of the plaintiff, nec-non of assaulting and beating the plaintiff's wife*, per quod consortium uxoris suæ amisit for 3 days. Found against the defendant in both. It was moved, that the husband ought not to join the battery of his wife with the battery of himself; but resolved that the action was well brought; for it is not brought in respect of the harm done to the wife, but for the husband's particular loss, that he lost the company of his wife, which is only a damage to himself. Cro. J. 501. pl. 11. Mich. 16 Jac. B. R. Guy v. Livesey. 2 Roll. Rep. 51. Guy v. Lufy, S. C. but reports it only as for a trespass done to the feme, and judgment for the plaintiff.

28. The husband brought an action, for that the defendant made an *assault on his wife, & illam verberavit, and her simul cum one gown, &c. abduxit, &c. & detinuit, &c. for five years, per quod consortium nec-non consilium & auxilium in rebus domesticis amisit, quæ habere debuisset.* The plaintiff had a verdict and 300l. damages; and upon error in the exchequer-chamber, it was objected that the action could not be maintained by the husband alone, for the wrong done to his wife; but all the justices and barons held, if it had been only brought for an injury done to her, the baron ought to join his wife with him; but here it was for a loss and injury done to the husband, in depriving him of the company and assistance

barons; and this verdict and judgment do not bar the wife to have an action after the death of her husband for the battery, or she may join with her husband in another action.——Action was brought by baron and feme for battery of the feme, per quod consortium amisit, and held good; and says that a like judgment was affirmed in the exchequer-chamber. Jo. 440. pl. 7. Trin. 15 Car. B. R. Anon.

Baron alone shall have action for words spoke of the wife, where they are only actionable in respect of collateral damages.

* 29. Case was brought by baron and feme, for words spoke of the feme; and judgment was given in C. B. that the husband and wife should recover. This was assigned for error in B. R. because the baron only is to have the damages, and the judgment ought to be, that the husband alone should recover; but judgment was affirmed by the opinion of the whole court. Godb. 369. pl. 459. Hill. 2 Car. B. R. Litfield v. Melherse.

Sid. 346. pl. 11. Mich. 19 Car. 2. B. R. Anon.——An action of slander was brought by baron and feme for words spoken of the wife, per quod the husband lost his trade; and it was held, that if the words would maintain an action without the special damage, then they should have judgment; but if the words were not actionable without the special damage, then it was ill; for the wife ought not to be joined. Cited by Holt Ch. J. as a case which he remembered. 2 Ld. Raym. Rep. 3032. Hill, 2 Ann. in case of Ruffel v. Corne.——Gould J. said he remembered the same case. Ibid.

30. If an award be made, that 7 l. shall be paid to feme covert, and 13 l. to the baron, the baron alone shall have action for all the money, because it is a thing which comes after the coverture; per Hutton & Yelverton J. absentibus aliis. Litt. Rep. 13. Hill. 2 Car. C. B.

S. P. cited by Powell J. to have been adjudged, and seems to intend S. C. See 3 Lev. 403. Mich. 6 W. & M. in C. B. in the case of Howell v. Maine.

31. Baron and feme brought debt, and recovered 200 l. and 70 l. damages. The wife died. Upon praying execution for the husband, the court inclined it should not survive, but that administration ought to be committed of it as a chose en action. But afterwards they agreed that he might take execution; and that by the judgment it became his own debt, due to him in his own right, and he took out scire facias accordingly. Mod. 179. pl. 12. Pasch. 26 Car. 2. C. B. Miles's case.

S. P. per Hutton and Yelverton J. The baron may have action alone, or may join with the feme.

32. If a bond be given to baron and feme, the husband shall bring the action alone, and this shall be looked upon as a refusal as to her; per the chief justice, who said he remembered this as an authority in an old book. 2 Mod. 217. Pasch. 29 Car. 2. C. B.

Litt. Rep. 13. Hill. 2 Car. C. B.——The baron may have action alone, per Coke Ch. J. to which Doderidge and Haughton agreed. Roll. Rep. 359. pl. 11.

If a bond debt be due to the wife, the husband may sue alone without joining the wife; per cur. Vern. 396. pl. 366. Pasch. 1686.——See (T) 48 E. 3. 12.

33. Debt by the baron alone upon a bond to the feme during the coverture, conditioned to pay money to the feme; and after divers arguments the whole court gave judgment for the plaintiff. 3 Lev. 403. Mich. 6 W. & M. in C. B. Howell v. Maine.

34. Trover

34. Trover brought by the husband for money paid by the plaintiff's wife to the defendant, for land conveyed by the defendant to the plaintiff's wife by bargain and sale, without the husband's knowledge. And per Holt Ch. J. if articles of agreement are made by a feme covert, by order and appointment of her husband, and the money is paid by the wife in pursuance of such agreement; or if the husband (though not privy at the time of the purchase) afterwards consents to it, the property of the money is altered, and the husband cannot maintain trover; but if he is not privy to such purchase, nor agrees to it, trover will lie for him against the vendor who receives his money of his wife. *Ld. Raym. Rep. 224. Pasch. 9. W. 3. at Guildhall. Gabrand v. Allen.*

35. Husband of feme executrix gives a new day to a debtor of testator's. The debtor makes a new promise to the husband; the husband may bring the action without joining the wife, but he must aver the * life of the wife. *1 Salk. 117. pl. 8. Mich. 10. W. 3. B. R. Yard v. Ellard.*

The wife could not be joined in this action, for she was no party to the agree-

ment or contract between her husband and defendant, and they would have been nonsuited if they had joined; for a promise to the husband is not a promise to husband and wife. *Carth. 463. S. C. and as an authority in point was cited Yelv. 84. Lea v. Mimme.—12 Mod. 207. S. C. it is a special promise made to the husband, to whom the payment is only to be made, and the recovery on this promise must be only to him in his own right, which promise does not alter the debt, because it is not of a higher nature, but is a sort of collateral security, and the money recovered on this promise is no part of the personal estate of the testator; for if the husband dies, his executor shall have execution thereof, but yet when it is recovered it is a devastavit in the husband, so far as he recovers.*

* [76]

36. If husband and wife jointly sue for debt due to wife before marriage; and husband dies, and wife continues the suit, the money, when recovered, shall not be assets to executors of husband; per Holt. *12 Mod. 346. Mich. 11. W. 3. Anon.*

(R) [In what Actions they] ought to join.

[1. **B**ARON and feme must join in *detinue for charters* concerning the inheritance of the feme, (for the feme shall have them again when they are recovered) *38 H. 6. 4. agreed.*]

Br. Baron and Feme, pl. 57. cites *38 H. 6. 3. S. C.*

See (Q) pl. 3. S. C.—*Thel. Dig. 30. lib. 2. cap. 5. cites S. C.*—So of charters concerning their joint possessions. *Br. Baron and Feme, pl. 74. cites 38 H. 6. 25.*—*Upo: trover* the baron and feme shall join in *detinue* of charters belonging to both; but upon *bailment* of charters made by the baron alone, he alone shall have the action; note the diversity. *Br. Baron and Feme, pl. 57. cites 38 H. 6. 25.*

[2. In an *avowry for rent* in the right of the feme, they ought to join. † *15 Ed. 4. 10. † 4 H. 6. 14.*]

† S. C. cited *Arg. Litt. Rep. 375.*

‡ *Br. Avowry, pl. 70. cites S. C.*—See (S) pl. 2. S. C.—*Fitzh. Avowry, pl. 8. cites S. C.*—But where baron and feme seized in *jure uxoris make lease for years, rendering rent*, they may join in action of debt, or the baron may have debt alone if he will. *Br. Joinder in Action, pl. 65. cites 7 E. 4. 6.*—See tit. *Avowry* (N) pl. 1, 2, 3, 4. and the notes there.

[3. They ought to join in actions [for things] due to the feme before coverture.]

For a debt due to the feme dum

solâ, the baron and feme must join in action. *Mo. 422. pl. 584. Mich. 37 & 38 Eliz. in case of Fenner v. Plasket.*—The husband alone brought debt on a bond made to the feme dum *solâ*, and the court

court held it ill; for if cause of action arise before coverture, though it be but trespass where damages only are recoverable, they must join. Keb. 440. pl. 32. Hill 14 & 15 Car. 2. B. R. Hardy v. Robinson.——Litt. Rep. 375. Arg. cites 7 H. 7. as to the obligation, and 22 R. 2. Brief, 933. as to trespass, accordingly.

Bond was given to a *feme sole* conditioned to pay so much to her on a day certain. Afterwards she married the plaintiff, who brought debt on the bond; and judgment was given for the plaintiff. 3 Salk. 54. pl. 7. Powell v. Maine.——10 Mod. 163. Arg. says, that the husband cannot sue alone upon a bond given to the wife *dum sola*.——Ow. 82. Paich. 4. & 5 P. & M. Arg. says, that she shall join; but if a right of action accrues after marriage, she shall not.

4. Where the *baron and feme lose by default the land tailed to the feme*, they shall have the *quod ei de forceat* jointly, notwithstanding that the baron had nothing but in right of his feme. Thel. Dig. 30. lib. 2. cap. 5. f. 33. cites Hill. 5 E. 3. 175. and that so agrees Mich. 29 E. 3. 61. where she lost by default before the coverture. But says the contrary was adjudged 4 E. 3. 153. but *contra legem*.

[77] 5. *Affise against several; one pleaded jointenancy with his feme by deed, &c.* not named, to which the other said, that he who pleaded jointenancy had nothing the day of the writ purchased, but another was tenant, which the other could not deny, and therefore the affise was awarded without making the feme party; *quod nota*. Br. Jointenancy, pl. 32. cites 12 Aff. 37.

6. Where the *baron and feme have the reversion to them, and to the heirs of the baron*, they shall join in writ of *waste*. Thel. Dig. 30. lib. 2. cap. 5. f. 30. cites Hill. 17 E. 3. 17.

Br. Baron and Feme, pl. 22. cites S. C. accordingly; for nothing is to be recovered but only damages.——2 Inst. 563. S. P. and cites S. C.
7. Champerty was brought by the baron alone, for that the defendant maintained J. N. against the plaintiff in affise, by which the now plaintiff and his feme, tenants in affise, lost the land, to the damage of 1000 marks, and awarded good for the baron alone without his feme. Br. Champerty, pl. 2. cites 47 E. 3. 9.

Ibid. f. 20. S. P. cites 3 H. 6. 54. 5 E. 3. 213. 24 H. 3. Brief 282. 10 E. 3. 525. 18 E. 3. 54.
8. Where the *baron and feme lease the land of the feme for years*, they ought to join in writ of *waste*. Thel. Dig. 30. lib. 2. cap. 5. f. 32. cites Hill. 7 H. 4. Brief 227.

9. If fine is levied to feme covert, yet she and her baron ought to join in *quid juris clamat*; *quod nota*. Br. Baron and Feme, pl. 67. cites 11 H. 4. 7.

Br. Coverture, pl. 61. cites S. C. Ibid. pl. 76. cites S. C. Br. Quid juris clamat, pl. 23. cites S. C.
10. *Quid juris clamat* was abated, because it was brought by feme covert, without naming the baron, notwithstanding that the fine was levied to her when she was sole; *quod nota*. Br. Coverture, pl. 16. cites 11 H. 4. 7.

Br. Joinder en Action, pl. 94. cites S. C. accordingly.
11. Affise of darrein presentment is not maintainable by the baron alone in *jure uxoris*, without naming the feme with him; contrary of *quare impedit*. Br. Darrein Presentment, pl. 3. cites 14 H. 4. 12.

12. One who is *warden of the Fleet in right of his feme* shall have bill of *trespass* by the privilege of the place, without naming his feme. Thel. Dig. 30. lib. 2. cap. 5. f. 32. cites Mich. 9 E. 4. 43.

13. Action *against a feme covert* who appeared to it, because she did not know if her *baron (being beyond sea)* was alive or not, and was condemned upon plea. The *baron came back*; they shall have writ of error, and shew the matter aforesaid, and it lies well; by all the justices. Br. Error, pl. 173. cites 18 E. 4. 4.

If a feme covert be condemned without her baron, both shall have writ of error.

Br. Baron and Feme, pl. 62. cites 18 E. 4. 3. * This is misprinted, and should be 4. 2. pl. 20. — It was agreed clearly, that if process be sued against feme covert as against feme sole, she cannot avoid it by writ of error, and cites 18 E. 4. 4. 24 E. 3. 24. Error, 10. 22 H. 6. 31. 17 Aff. 17. 5 E. 3. Per quæ Servitia 16. 20 or 21 E. 3. in Quid Juris clamat, fol. 10.

A feme covert brings a writ of error of a judgment against herself had during coverture, and the judgment was affirmed, because she might have pleaded it to the action; otherwise if the husband had joined in the writ of error. Cumb. 332. Trin. 7 W. 3. B. R. Strike v. Dikes.

14. And if she be outlawed, they shall join in writ of error, otherwise it cannot be reversed, and if he will not join, this is a divorce of a shrew. Br. Error, pl. 173. cites 18 E. 4. 4.

Br. Joinder in Action, pl. 88, cites S. C.

15. It was adjudged that baron and feme shall join in *ejectione firme*. Thel. Dig. 29. lib. 2. cap. 5. f. 13. cites Pasch. 21 E. 4. 35. which agrees with Pasch. 7 E. 4. 6. & Mich. 7 H. 7. 2. in quare ejecit infra terminum.

In ejectione firme the feme may join. Hist. 44. Per Hitcham,

Trin. 5 Car. C. B. — Litt. Rep. 285. S. P. per Hitcham. — Roll. Rep. 359. Pasch. 14 Jac. Br. Coke Ch. J. the baron may have this action alone.

16. The *baron and feme executrix* to another, shall join in writ of *trespass of the goods of the testator taken during the coverture*; per Littleton. Thel. Dig. 30. lib. 2. cap. 5. f. 29. cites Pasch. 21 E. 4. 5.

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17. The baron shall not have action upon the statute of 8 H. 6. of the title of the feme without naming her; for the words are *expulit & disseisivit*. Mo. 5. pl. 15. in a nota, cites it as resolved, 5 E. 6. Lane v. Andrews.

Benl. 29. pl. 42. cites S. C. & S. P. accordingly. — S. C.

cited by Ventris J. 2 Vent. 195. Trin. 2 & 3 W. & M. in C. B.

18. Writ of *mesne* shall be brought by the baron and feme, *supposing that both were distrained*, and yet feme has no property in chattels, but the action is real. Br. Coverture, pl. 65. cites F. N. B. in the additions there.

19. It was held by the court, that if a *disseisin* be made upon the husband and wife, in the lands of the wife, that in an action brought for to recover the lands again, the husband and wife are to join, but in an action of trespass they may sever. Bullt. 21. Pasch. 8 Jac. Anon.

20. If a man promises to give 100l. to the wife of J. S. they ought, per curiam, to join in action for recovery of this. Bullt. 21. Pasch. 8 Jac. Anon.

21. If a lease be made by husband and wife, of the land of the wife, rendering rent, in an action for rent behind, they are both of them to join; per Fleming Ch. J. Yelverton J. said, that in the last

If baron and feme make a lease rendering rent,

the baron alone shall have the action for the rent arrear; per Hutton & Yelverton J. absentibus aliis. Litt.

Rep. 13. Hill. 2 Car. C. B. — Of a rent running in the wife's right after marriage, she need not join in suit. Chan. Cases 41. Trin. 14 Car. 2. obiter, in case of Clerk v. Lord Angier. — N. Chan. Rep. 78. Clerk v. Lord Anglesey, S. C. & S. P.

Roll. Rep. 360. pl. 11. S. P. accordingly in S. C.

22. Action of *waste in tenuit* brought in the right of the wife, must be brought by both, yet he recovers only damages; per Haughton J. but per Coke and Doderidge, this is because it favours of the *realty*, and the *locum vastatum* is there also to be recovered, and therefore they are to join. 3 Bullst. 165. Pasch. 14 Jac.

Roll. Rep. 359. pl. 11. S. P. by Coke Ch. J. in S. C.

23. *That which the husband may discharge alone, and of which he may make disposition to his own use*, he may have an action in his own name for the recovery thereof, without joining his wife with him; per Doderidge J. to which Coke Ch. J. agreed, and said it was a true and a good ground. 3 Bullst. 164. Pasch. 14 Jac.

So where the baron was beyond sea. Totl. 459. cites 31 and 32 Eliz. Farewell v. Curson — Ibid. 160. cites 11 Car. Portman v. Popham.

24. A bill preferred without the privity of her husband, allowed. Toth. 158. cites Mich. 14 Jac. Lady St. John v. Englefield.

Litt. Rep. 374. Trin. 6 Car. C. B. the S. C. and adjournatur.

25. Advowson descended to B. an infant, and her mother presented to an avoidance. The clerk was instituted and inducted. B. afterwards came to full age and married D. the plaintiff, and the church became void again; and the bailiffs, &c. of D. without any title, presented W. and the church being so full, D. the husband alone brought *quare impedit*. The court agreed that the husband in this case might have presented, and then upon disturbance he only should have action; but in this case the church was full before the presentation; sed adjournatur. Het. 159. Hill. 5 Car. C. B. Wollaston Dixy v. the Bailiffs, &c. of Derby.

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26. A feme covert cannot sue unless there be a *severance*. Toth. 161. cites Tr. 15 Car. Roe v. Lady Newburgh.

27. In *assumpsit* by J. S. against B. on a promise to him by B. that if he would marry E. his daughter, he would give her as much as he gave to any other of his children except J. Though this promise was before the marriage, yet Hide J. doubted if J. S. and E. ought not to join in this action. Sid. 25. pl. 6. Hill. 12 Car. 2. C. B. Shipston v. Booler.

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28. A legacy was devised to a *feme then under coverture*, the husband exhibited his bill without his wife, and upon demurrer held not good; for of *things merely in action* belonging to a wife, as a

bond, &c. she must be joined. N. Ch. R. 78. Mich. 13 Car. 2. Car. 2.
Clerk v. Ld. Anglesey. S. C. in totidem verbis,

but adds, that if the husband alone should sue the bond and be nonsuited or dismissed, that will not conclude the case; but if he dies before judgment or decree, the wife cannot revive the suit. — 2 Freem. Rep. 160. pl. 207. S. C. in totidem verbis.

29. If *cause of action arises to the feme before coverture*, though it be but *trespass*, in which damages only are recoverable, the baron and feme must join; per cur. obiter. Keb. 440. pl. 32. Hill. 14 and 15 Car. 2. B. R. in case of Hardy v. Robinson.

30. Where the action, if not discharged, shall survive to the wife, in such case the baron and feme must both join. 2 Mod. 269. Freem. Rep. 236. pl. 247. Mich. 1677. S. C. & S. P. by North Ch. J.

31. By the rules of the spiritual court a feme covert may sue alone in every one of the following cases, viz. when she is *executrix* or *administratrix*, or *legatee* or *legatory*, on *defaming* or *defamed*; per Dr. Pinfold. 10 Mod. 64. Mich. 10 Ann. B. R. in case of D'Aeth and Baux. And per Parker Ch. J. the reason of the difference between the common law and the civil law is this, that in the spiritual court though the husband be not named, he may come in *pro interesse suo*, and make defence himself, should the wife desert the cause. 10 Mod. 264. Mich. 1 Geo. 1. B. R. in case of Clerk and Lee.

32. Cases of coverture are not to be extended to the *queen*; for she is of that dignity in law, that she may sue in her own name; for she has a separate property distinct from the king her husband, and the subject may have remedy against her without applying to the king; for he being employed about the ardua regni, is not to be interrupted by any thing that does not immediately relate to himself. G. Hist. of C. B. 198, 199. Co. Litt. 133. a. S. P.

(S) * May. [Ought to join.]

[1. **BARON** and feme assign auditors to the receiver of the feme before coverture, and he is found in arrears, they ought to join in debt thereupon; for the debt was before coverture, and is only put in certain by the auditors. 15 Ed. 4. 9.]

[In what cases they ought to join.] — Gouldsb. 160. pl. 91. Arg. cites 16 E. 4. 8. S. P. and so it should be, viz. Mich. 16 E. 4. 8. a. b. pl. 4. and the book of 15 E. 4. 9. is upon a rescous brought by baron and feme; and the mistake in Roll, as to citing 15 E. 4. may in some measure be owing to the Year-book in † pag. 8. of 16 E. 4. being misprinted 15 E. 4. — Br. Baron and Feme, pl. 60. cites 16 E. 4. 8. S. P. — L. married a feme, to whom monies were owing dum sola. L. and the debtor came to account for the money, and being found in arrear, promised L. to pay him the money due at a certain day, and for non-payment L. brought an indebitatus assumpsit on account. Per Glyn Ch. J. the nature of the debt is not changed by the account, no more than the accounting with an executor; but a special promise may alter the debt. Here is a promise made to L. the husband, and he has brought the action as if the defendant was indebted to him, yet he is not indebted to him generally, but sub modo, viz. in jure uxoris. And he said that there is another point in the case, and he conceived that here is cause of action; but whether it be applicable to make it a special debt, is the question. But this matter being moved on a writ of error, and the writ of error being sought, the writ was ordered to be quashed. Sty. 472, 473. Mich. 1655. B. R. Cony v. Laws.

Fol. 348.

* The pleas herein Roll belong to the title of (R) and should be

† [80]

[2. If

Br. Avowry, [2. If a *rent* be due to a feme before coverture, as tenant in dower, she and her husband ought to join in an *avowry*. 4 H. 6. 14.]

and so for the rent due after coverture; and the same law of a consuance by the bailiff. — Fitzh. Avowry, pl. 6. cites S. C. — See (R) pl. 2. S. C. — A. seised in fee granted a rent-charge to M. his daughter. The rent being arrear, M. married P. and afterwards P. distrained, and avowed for the rent so arrear, supposing in the avowry that the same was arrear, and not paid to the said P. and his wife. It was moved that it was ill, because it appears it cannot be due to P. but only to M. dum sola fuit; but held to be only matter of form and surplusage; and though he does not say adhuc a retro existit, it is well enough in substance; and judgment affirmed. Cro. J. 282. pl. 3. Trin. 9. Jac. B.R. Bowles v. Poor.

3. Where a man is *seised in jure uxoris in a feignory of homage, fealty, escuage, rent, and suit of court, and has no issue by his feme, yet he may distrain for all the services, unless for homage*. Br. Avowry, pl. 85. cites 27 Aff. 51.

4. Where *trespass* is brought against baron and feme, and the plaintiff recovers, the baron alone shall not have attain; for it shall be brought according to the record. Br. Baron and Feme, pl. 22. cites 47 E. 3. 9. per Tank. & Finch.

5. *Ravishment of ward* may be brought by baron and feme, per judicium; for it is a *chattel real*, which the feme may have by survivorship, and not the executors of the baron. *Contra of chattel personal*. Br. Ravishment, pl. 15. cites 14 H. 4. 24.

6. If an *action accrues before marriage*, as where a bond is made to her before marriage, she shall join with her husband in an action upon the bond; but if a right to an action doth accrue after marriage, there she shall not join. Arg. Ow. 82. Pasch. 4 & 5 P. & M. in C. B.

7. *Debt* was brought by the husband alone for debt, damages, and costs recovered by him and his wife now living, and because the wife was not joined in this action the defendant demurred; but adjudged for the plaintiff without argument, that the action well lay. Cro. E. 844. pl. 28. Trin. 43 Eliz. in cam. scacc. Butler v. Delt.

Cro. J. 205. pl. 10. Hill. 5 Jac. S. C. and judgment was affirmed. — S. C. cited Sid. 25. pl. 6. by the Ch. J. as adjudged that the action ought to be brought by both. — 2 Sid. 128. Hill. 1658. Newdigate J. said he remembered a case where the same point was adjudged accordingly. — But where the action is on a general indeb. ass. on a promise implied in law, as for *periwig-maker's work done by the wife*, the law here implies no promise to the wife; for she is a servant to the baron, who is at the charge of materials to carry on the work, and so the law implies the promise only to him. Carth. 251. Mich. 4 W. & M. in B. R. Buckley & Ux. v. Collier. — 4 Mod. 156. S. C. the court held the declaration not good, the action being brought for a personal thing, which would not survive; and in personal actions the law is clear that they cannot join. — 3 Salk. 63. pl. 3. S. C. that she ought not to be joined in this action with her husband, unless an express promise had been made to her to pay the money. — 1 Salk. 114. pl. 2. S. C. and

8. *Assumpsit* by husband and wife, on a promise to the wife after the coverture, that *in consideration the wife would cure him of such a wound, he would pay her 10 l.* After judgment for the plaintiffs, error was brought, and assigned that the husband alone should have brought the action, it being a personal duty accrued during the coverture; sed non allocatur, it being grounded on a promise to the wife, and on a matter arising on her skill, and to be performed by her, and so she is the cause of the action, and shall survive to the feme, and judgment affirmed. Cro. J. 77. pl. 7. Trin. 3 Jac. B. R. Brashford v. Buckingham.

and the plaintiff relied principally upon BURET's case; but per cur. Burchet's case differs; for there was an express promise to the wife, and to that the husband assented by bringing an action thereupon, whereas here is nothing but a promise in law, and that must be to the husband, who must have the fruits of his wife's labour, for which he may have a quantum meruit; and the advantage of her work shall not survive to the wife, but goes to the executors of the husband; for if she dies, her debts fall upon him, and therefore so shall the profits of her trade to his executors; and judgment for the defendant.

9. Trespass by husband and wife for *beating the wife, and taking his goods*. It was found for the plaintiff *as to the beating*, and for the defendant *as to the residue*. It was moved in arrest of judgment, that the action was not well brought quoad the goods, and that the severance by the verdict did not cure it; and judgment was stayed, no one appearing on the other side. Lev. 3 Mich. 12 Car. 2. B. R. Talbot v. Bacon.

Trespass brought by the husband and wife, for the battery of the wife, and taking from her an apron and pinner.

It was moved in arrest, that it is *not alleged in whom the property was*; for it cannot be in the wife, and it may be in a stranger, and then the husband hath no cause of action; and if they were the goods of the husband, then the wife ought not to be joined in the action, but the husband is to bring the action alone; and so it was held per cur. and the judgment stayed. 2 Lev. 20. Mich. 23 Car. 2. B. R. Dunwell & Ug. v. Marshall.——2 Keb. 813. pl. 18. S. C. and judgment stayed per cur. unless there had been several pleas, or several damages.

They cannot join in trespass for *battery of the wife, and taking the baron's goods*; and notwithstanding the words of the Register, 105, are express as words can make a case, yet the opinion of the whole court was according to the constant tenor of the more modern authorities, that they cannot join. Show. 245. Hill. 3 W. & M. Meacock v. Farmer.——Comb. 144. Mich. 3 W. & M. in B. R. in case of Baker v. Barber, the Register, 150. was cited to the same purpose; but the court held that it was not law.

Trespass was brought by the baron alone for *breaking his house, and beating and wounding his wife, and imprisoning of her for 3 hours*; and also for detaining the possession of the house, and for menacing his wife and servants, *per quod negotia sua infesta remanserunt*. Cited by Gould J. 2 Ld. Raym. Rep. 1032. as a case in B. R. Pasch. 7 W. 3. who said that he moved in arrest of judgment, that for some of these wrongs, as the beating and imprisoning the wife, the wife ought to be joined; but judgment was given for the plaintiff by Eyre and Rokeby, dubitante Holt; for they held that the *per quod* went through the whole count.

Action by baron for *entering his house, taking away his goods, and beating his wife*. It was urged that beating the wife was laid only to aggravate damages, and the court seemed to be of that opinion. 3 Mod. 342. Hill. 11 Geo. 1: Read v. Marshall.

10. In trover and conversion by husband and wife, the *trover* is supposed to be *before the marriage, and the conversion after*. Hyde Ch. J. and Keeling were of opinion, that the action ought to be brought by the husband alone, because it is the conversion which is the cause of action, and this is subsequent to the marriage; but Windham and Twisden J. held clearly that it was well brought; for the *difference is between actions which affirm a property, as replevin, detinue, &c. for such ought to be brought in the name of the baron only, and actions which disaffirm property, as trespass, trover, &c. for those ought to be brought in both their names, because they are founded upon the tort done before the coverture*. Sid. 172. pl. 2. Hill. 15 & 16 Car. 2. B. R. Powes & Ux. v. Marshall.

11. Assumpsit by the husband, in which he declared that the defendant being *indebted to his wife dum sola, she being an executrix*, he promised to pay, &c. and farther declared upon an insinual computasset with himself, and promised, &c. After verdict it was moved that the wife ought to be joined, because the debt was due to the feme dum sola. The judgment was stayed, because in all cases, *so long as the first contract or specialty made to the wife dum sola*

sola continues, she must be joined; for if she dies, the husband cannot sue for it, but as administrator to her. Sid. 299. pl. 4. Mich. 18 Car. 2. B. R. Tirrell v. Bennett.

Freem. Rep. 236. pl. 247. S. C. judgment was stayed till moved by the other side.

* 12. Case, 8c. by the husband alone, in which he declared, that he and in the right of his wife was seised of a messuage and a bakehouse, and that the defendant had *built an house of office so near the bakehouse, that the walls of his house was ruinous, and the air so unwholesome, that he lost his customers.* It was moved in arrest of judgment, that the wife ought to join in this action; for where she may maintain an action, if she survive her husband, for a tort done in his life-time, and where she may also recover damages, in such cases she must join. Per curiam, *where the action, if not discharged, will survive to her, she must join*; but if she had joined in the principal case, it would have been hard to have maintained the action, because *intire damages* were given; but for losing the custom to his bakehouse he alone ought to bring the action. 2 Mod. 269. Mich. 29 Car. 2. C. B. Froddike v. Sterling.

(T) In what Actions they may join.

Br. Baron and Feme, pl. 50. cites 15 E. 4. 9. S. C. — See the case of Froddike v. Sterling at (R)

[1. **WHERE** the feme, after the death of the baron, is to have the *action to punish the tort done in the life of the husband*, there the baron and feme may join. 15 Ed. 4. 10.]

Br. Baron and Feme, pl. 50. cites S. C. —

[2. Baron and feme may join in a writ of *rescous*, where the baron claims the *seigniorie in the right of the feme.* 15 Ed. 4. 9. b. adjudged.]

Br. Joinder en Action, pl. 36. cites S. C. — See [Q] pl. 8.

Br. Baron and Feme, pl. 50. cites S. C. but S. P. does not fully appear as to the cutting of trees, but only says trespass on the land of the feme. — Br. Joinder en Action, pl. 36. cites S. C. accordingly. — Br. Baron and Feme, pl. 41. cites 14 H. 4. 12. and mentions cutting trees expressly.

[3. If a stranger *cuts trees upon the land of the feme*, they may join. 15 Ed. 4. 9. b.]

A writ of *trespass of trees cut and land dug* brought by the baron alone where he had the land in right of his feme was abated. Thel. Dig. 29. lib. 2. cap. 5. f. 15. cites Pasch. 21 R. 2. Brief, 933. but says the opinion of Hussey, Mich. 7 H. 7. 2. was, that in such case they may join in trespass of trees cut. — S. C. cited Litt. Rep. 375. that she ought to join, because the trees, and so of houses pulled down upon the land of the feme, are parcel of the inheritance; but for cutting or spoiling grafts, which is but a temporary profit, the baron alone shall have the action.

[4. They may join in an *action upon 5 R. 2.* for the land of the feme, admitted. 8 Ed. 4. 2. b.]

Cro.C. 503. pl. 4. S. C. but S. P. does not appear. — Ibid. 505. pl. 7. S. C. & S. P. held

[5. If *A. by indenture conveys land to B. in fee, and covenants with him, his heirs, and assigns, to make any other assurance thereof upon request for the better settling thereof upon B. his heirs, and assigns, and after B. conveys it to C. in fee, who conveys to D. and his wife, and the heirs of D. and after D. requires A. to make another assurance, according to the covenant, and he refuses it,*

it, the baron alone, without his feme, cannot have an action of covenant against A. as assignee of B. because *he and his wife are assignees*, and therefore ought to join in the action. P. 14 Car. B. R. between MIDDLEMORE AND GOODALE, per curiam, adjudged upon a demurrer. Intratur, H. 12 Car. Rot. 228.]

accordingly by all the court, absente Bramston, and judgment for the defendant.—Jo. 406.

pl. 4. S. C. & S. P. resolved accordingly.

6. Where *distress* was taken upon the land, which the baron held in right of his feme, a writ of *replevin* was maintained brought by the baron and the feme, notwithstanding that the chattels belong to the baron alone. Thel. Dig. 29. lib. 2. cap. 5. f. 2. cites Hill. 2 E. 2. Replevin 42.

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7. But a writ of trespass was abated *trespass done to the baron and feme*, because the feme cannot recover damages for the trespass done to the baron. Thel. Dig. 29. lib. 2. cap. 5. f. 4. cites 3 E. 3. It. North. Brief, 737.

8. *Præcipe quod reddat* against baron and feme; *he made default*, and [she] *was received*, and *pleaded*, and *lost by verdict*; the baron and feme joined in attaint, and well, notwithstanding his default, and that he was not party to the issue. Br. Coverture, pl. 36. cites 16 Aff. 5.

Br. Jolender in Action, pl. 52. cites S. C.

9. Writ of trespass was maintained by the baron and feme of the eldest son of the feme taken and carried away. Thel. Dig. 29. lib. 2. cap. 5. f. 7. cites Mich. 30 E. 3. Brief, 300.

10. Baron and feme shall not join in *replevin*, because the feme cannot have property in goods during coverture; *quare* of goods which she has as *executrix*; for there it seems that they shall join. Br. Baron and Feme, pl. 85. cites 33 E. 3. and Fitzh. Replegiare 43.

S. P. Be. Replevin, pl. 56. cites 11 E. 2. and Fitzh. Return de Avers, pl. 31.

——The baron and feme shall join in *replevin* of goods of the feme taken *dum sola fuit*. Br. Baron and Feme, pl. 85. cites Fitzh. Recaption 31.

11. If feme tenant by *statute-merchant* is ousted, after which she takes baron, the baron alone may have the suit, and they may join if they will; for the thing is only a *chattel real*, which the baron alone may give or forfeit. Br. Baron and Feme, pl. 59. cites 39 Aff. 11.

12. Baron and feme may have debt upon an *obligation made to them*, and may join in action. Br. Dette, pl. 224. cites 43 E. 3. 10.

For being made during coverture, she cannot disagree to

it during the coverture. Br. Agreement, pl. 7. cites S. C. and 3 H. 6. 37. Fitzh. Brief 19. accordingly. —They may join. Br. Baron and Feme, pl. 55. cites 39 E. 3. 5.

A writ of debt was adjudged good, brought by baron and feme, upon an *obligation made to them* *even during the coverture*. Thel. Dig. 30. lib. 2. cap. 5. f. 21. cites Mich. 12 R. 2. Brief 639. And that so agrees Hill. 43 E. 3. 10 and Hill. 39 E. 2. 6. and 3 H. 6. 23. 37. and Mich. 16 E. 4. 8. but *ibid.* f. 22. says the contrary is held by Finch, 48 E. 3. 12. —Per cur. they may well join in the action, by which the defendant was awarded to answer; and per Babb. the baron alone might have brought the action if he would. *Quære inde*. Br. Baron and Feme, pl. 2. cites 3 H. 6. 37. —Br. Baron and Feme, pl. 50. cites 15 E. 4. 9. by Piggot.

Ad decem tantum was brought by

13. *Where nothing is to be recovered but damages, the baron alone shall have the action.* Br. Baron and Feme, pl. 17. by Brooke. the baron and feme, and because the feme was named, the writ was abated; quod nota. Br. Baron and Feme, pl. 17. cites 43 E. 3. 16.

So where a *lease* was made to husband and wife of an ancient mill, where the inhabitants of such houses used to grind their corn, and for not grinding they brought an action against them, it seems by a note of the reporter, at the end of the case, that he thought the action would not lie, being brought by the husband and wife both, and being only to recover damages, and not for the term. Hob. 189. pl. 233. Trin. 14 Jac. Harbin v. Green.

The baron may have maintenance without his feme; for it is in a manner personal. Br. Parnor de Profits, pl. 24. cites 4 E. 4. 30.

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Br. Baron and Feme, pl. 23. cites S. C. & S. P. accordingly, and that the

feme surviving shall have the term if the baron dies without demising it. — Thel. Dig. 30. lib. 2. cap. 5. f. 19. cites S. C. but says it was held, Mich. 2 H. 4. 6. that one who holds a manor in right of his feme, should have writ of covenant for non-performance of divine service in the manor, &c. alone without naming his feme.

See [Q.] Howell v. Maine.

Br. Dette, pl. 198. cites S. C.

It was held that the baron alone without his feme should not have writ of *ravishment of*

ward as guardian in socage, where he has the ward by reason of his feme. Thel. Dig. 29. lib. 2. cap. 5. f. 8. cites Hill. 7 R. 2. Brief, 634.

The baron and feme shall join in writ of *intrusion of ward*. Thel. Dig. 29. lib. 2. esp. 5. f. 8. cites Mich. 22 R. 2. Brief, 937.

The baron alone brought *ravishment of ward*, for a ward he had in right of his feme, and the writ was held good; but there it is said, that otherwise it is in right of ward; but it is said there (quære); and at last it was agreed that the action should be allowed, but the surest way is to have both joined. Ow. 83. cites 43 E. 1. Statham.

14. It was adjudged, that *champerty* brought by the baron alone upon assise which passed against him and his feme is good. Thel. Dig. 29. lib. 2. cap. 5. f. 9. cites Mich. 47 E. 3. 9. and 47 Aff. 5. and that it was said, that it should be good the one way or the other. Hill. 3 H. 4. 10. And it was held Mich. 20 H. 6. 1. that they may join in writ of maintenance done in bill of fresh force between the baron and feme and another.

Br. Baron and Feme, pl. 50. cites 15 E. 4. 9. S. P.

15. *Covenant* was brought by baron and feme, and counted that the defendant leased to them for years, and after ousted them, &c. and this awarded to be well brought, for if the baron die, the feme shall have the term. Br. Covenant, pl. 10. cites 47 E. 3. 12.

16. If *obligation* be made to Alice, feme of R. D. it is good, and the baron may release it, and both may have action, and if the baron dies the feme shall have the action if the baron has not released. Br. Baron and Feme, pl. 24. cites 48 E. 3. 12. per Belknap.

17. Baron and feme sold the land of the feme for 20l. and levied a fine accordingly, and yet, per Wich, the action of debt shall be brought by the baron alone, for it is his grant alone, and if he dies his executor shall have action and not the feme; quære, for Finch was absent, and the reporter agreed with Wich. Br. Baron and Feme, pl. 25. cites 48 E. 3. 18.

18. Writ of *ravishment of ward* was maintained for the baron alone, who had ward in right of his feme, &c. Thel. Dig. 29. lib. 2. cap. 5. f. 7. cites Trin. 48 E. 3. 20.

19. And a writ of *ravishment of ward* was maintained for the baron and feme, where the ward was granted to them two. Thel. Dig. 29. lib. 2. cap. 5. f. 7. cites Hill. 14 H. 4. 24.

20. Where the *release of the baron is a good plea*, such actions may be brought by the * baron only, and may be brought by the baron and feme also. Br. Baron and Feme, pl. 28. cites 50 E. 3. 13.

* As trespass of cutting his trees, chafing in his warren,

breaking his house and the like. Br. Baron and Feme, pl. 64. cites 43 E. 3. 8. 16.

21. Writ of *trespass* was maintained by the baron alone, where the *tenure was of him and of his feme*. Thel. Dig. 29. lib. 2. cap. 5. §. 6. cites Hill. 6 R. 2. Brief, 633. And that such writ was adjudged good brought by both. Mich. 15 E. 4. 9.

22. *Baron and feme were disseised and † robbed*, and both join in *assise*, though the goods of the baron were carried away, and both recovered the land and damages, yet the baron recovered for the goods carried away alone. Br. Joinder in Action, pl. 98. cites 11 H. 4. 16.

† The goods upon the premises were carried away by the disseisor, 7 H. 6. 16.

b. S. C. cited by Westbury J. and Cheine Ch. J. to the same intent. — Fitzh. Judgment, pl. 70. cites S. C. — Br. Judgment, pl. 20. cites S. C. — Br. Damages, pl. 51. cites S. C. — 2 nft. 236. cites same cases, and says it is worthy of observation. — Show. 346. cites S. P. and intends the S. C. but is much misprinted.

23. *Waste* by the baron and feme of a lease made by them during *the coverture*. Eller demanded judgment of the writ, because feme covert cannot make a lease; and yet because she may receive the rent after the death of the baron, and make avowry and distrain, &c. therefore the best opinion was, that the writ lies well; for it shall be said the † lease of the baron and feme till the baron be dead; for the feme cannot agree nor disagree in the life of the baron. Br. Baron and Feme, pl. 4. cites 3 H. 6. 53.

Br. Waste, pl. 120. cites S. C. and says that anno 7 H. 4. 15. because the baron alone brought the action, and did not name the feme, there-

fore the writ was abated, quod nota.

† [85]

24. *Maintenance* was brought by the baron and feme, upon *fresh force of land* which was *de jure uxoris*, and therefore the feme may join by the best opinion, by which the defendant passed over, but not by any award. Br. Baron and Feme, pl. 6. cites 20 H. 6. 1.

Br. Baron and Feme, pl. 15 cites S. C. — Br. Joinder in Action, pl. 3. cites

S. C. — It was held, that where the baron and feme had brought action of debt, that they might join in *maintenance* where the judgment was to answer as to the writ. Thel. Dig. 29. lib. 2. cap. 5. §. 10. cites Trin. 7 E. 4. 15.

25. Baron and feme shall not have a writ of *trespass* of the goods of the feme taken before the marriage, and of the goods of the baron taken after; per Newton. Thel. Dig. 107. lib. 10. cap. 15. §. 24. cites Hill. 21 H. 6. 33.

26. In trespass by baron and feme, of *battery done to them both*, after verdict found that both were beaten, the writ abated as to the battery of the baron, and for the battery of the feme they recovered their damages. Thel. Dig. 238. lib. 16. cap. 10. §. 53. cites Hill. 9 E. 4. 54.

Thel. Dig. 20. lib. 2. cap. 5. §. 5. cites S. C. and that so it appears, 22 Aff. 60 & 87. that

the baron and feme may join in trespass of the battery of the feme. — Thel. Dig. 107. lib. 10. cap. 15. §. 24.

cap. 15. f. 24. cites S. C. The damages were severally taxed, and adjudged good as to the battery of the feme, but not of the baron.

The husband and wife could not join in an action of *trespass for beating them both*; but if the verdict finds the defendant guilty as to beating the wife, but as to the husband, not guilty, this cures the mistake. 2 Vent. 29. Pasch. 28 Car. 2. C. B. Hocket v. Stegald. — 2 Mod. 66. Hocket v. Stidolph, S. C. held accordingly.

They may join in action of *assault and battery of the wife*; 11 Mod. 264. pl. 3. Hill. 8 Ann B. R. Todd & Ux. v. Redford. — S. P. Br. Trespas, pl. 190. cites 9 E. 4. 51. but not for battery of the baron. — Br. Baron and Feme, pl. 54. cites 9 E. 4. 52. S. C. but the baron of this shall have action alone; and because not, therefore the writ was abated for this part; quod nota. — Br. Brief, pl. 448. cites 9 E. 4. 51. S. C. — Br. Damages, pl. 85. cites S. C.

But per Powell J. they cannot join in such action for *beating both*, but it may be helped by *verdict separating the damages*. 11 Mod. 265. in case of Todd & Ux. v. Redford. — S. P. Br. Trespas, pl. 190. cites 9 E. 4. 51. S. P. Br. Damages, pl. 85. cites 9 E. 4. 51.

A. where an obligation is made to baron and feme, 27. *Where the feme after the death of the baron may have action,* there they may join; quod nota. Br. Baron and Feme, pl. 50. cites 15 E. 4. 9. per Brooke.

both may have action, and the baron alone may have action. Br. Baron and Feme, pl. 50. cites 15 E. 4. 9. — *So of trespass upon the land of the feme, maintenance, and the like.* Ibid.

See (S) pl. 1. 28. *Debt by baron and feme of arrears of account, and accounted that the defendant was receiver to the feme, when she was sole, to render account, and that the baron and feme assigned auditors after the espousals, and was found in arrears, &c.* and the joining of the baron and feme good by the opinion of the court; for the cause of action commenced by the feme, and the assignment of the auditors is *purstant* and arising by the feme. Br. Baron and Feme, pl. 60. cites 16 E. 4. 8.

29. A writ of trespass of *false imprisonment* was maintained for the baron and feme, of the imprisonment of the feme, &c. Thel. Dig. 29. lib. 2. cap. 5. f. 3. cites Mich. 6 E. 3. 276. and that so agrees Hill. 43 E. 3. 3. and by the baron alone, 22 E. 4. 44.

30. The baron and feme joined in *detinue of goods bailed by the feme before the coverture*. Thel. Dig. 30. lib. 2. cap. 5. f. 26. cites Mich. 21 H. 7. 29.

[85] 31. B. the wife of A. gave to C. 10 l. in consideration that C. should marry her daughter. C. promises the wife that if he did not marry the daughter, he would repay the 10 l. C. did not marry the daughter. A. and B. brought action against C. and held good; for the agreement of A. makes the promise good to A. ab initio, and it being made to the wife, they may join in the action. Cro. E. 61. pl. 4. Mich. 29 & 30 Eliz. B. R. Pratt v. Taylor.

32. The books agree, that for *personal things* they cannot join; but for *personal things in action*, it is in the husband's election to join the wife or not; per Gawdy, and judgment accordingly. Cro. E. 133. pl. 10. Pasch. 31 Eliz. B. R. Arundel v. Short.

S. C. cited
Cro. E.
608. pl. 9.
and all the
justices
were of the
same opinion.

33. If the husband is seised or possessed of a *rectory in right of his wife, or in jointure with him*, they may join in an action for *not setting out tythes*. Adjudged and affirmed in error. Moor 912. pl. 1289. Hill. 34 Eliz. B. R. Wentworth v. Crispe.

34. Husband and wife, seised of a house and lands in right of the wife, made a lease thereof for 21 years, and the lessee covenanted for himself, his executors, &c. to build a brick-wall upon part of the lands. The lessee afterwards assigned his term to B. who assigned it to C. and the husband and wife joined in an action against the assignee of the assignee of the lessee, for not building the wall. Admitted per cur. that the action was well brought by both. 5 Rep. 16. Pasch. 35 Eliz. B. R. Spencer's case, alias Spencer v. Clark.

A lease was made by husband and wife, in which the lessee covenanted with them to repair. The husband alone brought covenant, quod

tenet ei conventionem, according to the form, &c. of a certain indenture made between him on the one part, and the defendant on the other part. After verdict it was moved in arrest of judgment, because of this variance; but the plaintiff had judgment; for the indenture being by both, it is therefore true that it was made by the husband, and he may refuse quoad her, and bring the action alone. 2 Mod. 217. Pasch. 29 Car. 2. C. B. Beaver v. Lane.

35. In trover and conversion of a deed of a rent-charge, granted to the wife dum sola fuit, and that the deed came to the hands of the defendant after the coverture. It was said by the court, that the action was well brought by them two; for the action shall survive; for otherwise a grand inconvenience would ensue to the wife; for if the husband only should recover, and after die, his executors would have execution for the damages, and not the wife; and judgment was given accordingly. Noy 70. 39 Eliz. C. B. Ruffel and his wife's case.

36. Baron and feme cannot bring trover, and suppose the possession in them both; for the law, in point of ownership, transfers all the interest to the baron; per tot. cur. Yelv. 166. Mich. 7 Jac. B. R. in case of Draper v. Fulks.

37. In false imprisonment, resolved if an action be brought against a widow, who is found guilty, and before judgment she takes husband, the capias shall be awarded against her, and not against her husband; and for such imprisonment of the wife upon the capias, the action will not lie for the husband. Resolved per tot. cur. Cro. J. 323. pl. 1. Trin. 11 Jac. B. R. Doyley v. White.

2 Bult. 80. S. C. adjudged accordingly. Brownl. 226. S. C. adjudged.

38. A. seised in fee, and made a lease for years to W. the defendant, and afterwards conveyed the reversion to N. the plaintiff and his wife in fee. W. attorned, the lease expired, and the husband alone brought debt for rent arrear. Haughton J. at first thought the action ought to be brought by both, notwithstanding the term was ended; and said it hath been agreed that if the term had continuance, he ought to have joined her with him; but afterwards he thought the action well brought, and that there is no difference where they are assignees of the reversion; and where they are lessors, as to bringing debt for the rent; and his suing alone, in this case, is not in regard of his estate with his wife, but of the thing to be recovered by him, viz. the rent, which he only is to have; and all the other judges held the action well brought, and judgment for the plaintiff. 2 Bult. 233, 234. Trin. 12 Jac. Nooth v. Wyard.

* [87] Roll. Rep. 52. pl. 23. Nooth v. Viatt, S. C. and the action held to be well brought; and the court seemed to say (as the reporter says he understood them) that the baron might have action alone, though the lease had been con-

tinuing; whereas in this case the term was ended; and though it was objected that he named himself assignee, and that it appears that he and his wife were assignees, yet per cur. the plaintiff shall recover;

ver; for this is only surplusege, and so it was adjudged. — But 2 Bulstr 234. Doderidge said, that if he had brought the action as assignee, by an assignment made to him alone, whereas the reversion was assigned to him and his wife jointly, it had not been good; but the action being brought generally by him alone, is good, and he ought not to shew himself to be assignee.

S. C. cited by Coke Ch. J. 2 Bulstr. 204. accordingly. — S. P. and after a verdict for the plaintiff it was objected, that trover being laid before the marriage, and the conversion after, they ought not to join in this action; but the husband alone should have brought it, because the conversion is the cause of action. But per cur. it is good with or without the wife; for the trover gave the beginning of the action to the wife, though the conversion is the completing of the cause of action. 2 Lev. 107. Trin. 26 Car. 2. B. R. Blackburne v. Graves. — Mod. 120. pl. 22. S. C. but S. P. does not appear. — Vent. 260. pl. 261. Batmore v. Graves, S. C. & S. P. held accordingly, and judgment for the husband. — 3 Keb. 263. pl. 11. S. C. but S. P. does not appear. — Ibid. 329. pl. 24. Blackborough v. Graves, S. C. & S. P. adjudged for the plaintiff. — S. C. cited 1 Salk. 114. pl. 1. — S. C. cited Gilb. Equ. Rep. 100. Arg. — S. C. cited Arg. Chan. Prec. 414.

39. J. S. and his feme brought *trover and conversion*, and counted that they were the *goods of the feme dum sola*, and that she lost them, and the defendant found them; and afterwards they intermarried, and then the defendant converted them. Adjudged against the plaintiffs, because, notwithstanding the trover of the defendant, the property continued in the feme; and then by the intermarriage the property was in the baron, and then the *baron ought to have brought the action alone*, without his feme. Cited by Coke Ch. J. Roll. Rep. 45. Trin. 12 Jac. B. R. as Shuttleworth's case.

40. Case by husband and wife, for *presenting them in the spiritual court*, upon oath, for *making hay on Midsummer-day in time of divine service*, which was false. The defendant justified that they did make hay on that day, &c. The issue was found for the plaintiff. It was moved that the husband and wife cannot join in this action; for the *false oath against the husband could not be so against the wife*; but Coke Ch. J. said that here it is well enough; but he doubted whether any action lies for this at common law. Curia advisare vult. Roll. Rep. 108. pl. 48. Mich. 12 Jac. B. R. Anon.

and therefore it was adjourned.

41. Trespass of *assault and battery of the plaintiff nec non of assaulting and beating the plaintiff's wife, per quod consortium amittit uxoris sue for 3 days*. After verdict for the plaintiff as to both points, it was moved in arrest of judgment, that the husband ought not to join the battery of his wife with that done to himself, but ought to join her in this action; because the battery being done to her, she ought to have the damages if she survive the husband; but per tot. cur. the action is well brought by the husband alone; for it is not only for the harm done to his wife, but for his particular *loss of her company for 3 days*, which is only a damage and loss to himself; and judgment for the plaintiff. Cro. J. 501. pl. 11. Mich. 16 Jac. B. R. Guy v. Livesey.

2 Roll. Rep. 51. Guy v. Lufy, S. C. adjudged for the plaintiff. — Husband and wife cannot join in assault and battery, *per quod consortium amittit*; for the *per quod*, in such case, is the gift of the action; per Powell J. 11 Mod. 265. Hill. 8 Ann. B. R. in case of Dodd v. Redford.

Action by the baron alone, for battery of the feme *per quod consortium amittit*, was held good; and a like judgment was affirmed in the exchequer-chamber. Jo. 440. pl. 7. Trin. 15 Car. B. R. Anon.

42. Assumpsit by baron and feme. The defendant received of the plaintiff's money by the hands of the plaintiff's wife. The defendant promised unto them to pay it at such a day, and alleged the breach for non-payment, ad damnum eorum. After verdict it was moved that the promise was void, being for monies of the husband and wife, and cannot be ad damnum eorum. It was answered, that it may for monies due to the wife dum sola, &c. but it was held, that it shall not be so intended, unless it had been shewn; and judgment for the defendant. Cro. J. 644. pl. 6. Mich. 20 Jac. B. R. Abbot v. Blofield.

2 Roll. Rep. 237, S. C. adjournatur. Ibid. 250. S. C. adjudged that the action did not lie for both; and the plaintiff's counsel prayed that judgment be entered, in order to bring a new action, and declare better; for he said that the truth was, that the promise was made to the wife during coverture; and so it seemed to Doderidge J. that the action might then be brought against both.

43. Baron and feme brought escape, whereas the baron alone arrested the prisoner with a latitat, which he took out in his own name only; and now in the declaration on the escape, he declares that he took out the latitat *ea intentione to charge the prisoner on a bond made to the feme dum sola*; and held good by 3 justices, absente the other. 2 Roll. Rep. 312. Pasch. 21 Jac. B. R. Anon.

44. Where the life is not concerned, as where feme commits a trespass, the baron and feme must be joined; but where it concerns life, as in case of felony done by the feme, the appeal shall be against the feme only. Jenk. 28. pl. 53.

45. The husband covenanted to stand seized, &c. to the use of himself and his wife for their lives, for her jointure, and after to his son and heir, excepting the timber trees, saving that his wife shall have the strowds and loppings, and died, and the widow married again. The son and heir of the first husband cut down five oaks, and the second husband and his wife brought case against him, setting forth, that they lost the benefit of the loppings. After verdict it was moved, among other things, that the action is brought by the husband and wife, whereas it ought to be brought by the husband alone, because the wrong was done to his possession, and he alone might have released the damages; but adjudged well brought by both; for he having the land in right of his wife, she may join with him in the suit for the damages, and she shall have the damages and the action also if she survive her husband. Cro. Car. 437, 438. pl. 7. Hill. 11 Car. B. R. Treigmiell v. Reeves.

Jo. 376. pl. 3. Tragonel v. Rives, S. C. and adjudged that the action was well brought by the baron only.—S. C. cited by Glyn Ch. J. 2 Sid. 128.—S. C. cited by Ventris J. 2 Vent. 195. 2 Mod. 270. Arg. S. C. cited, and says, that

though the wrong was done to his possession, and he might have released, yet because there was also a wrong to the inheritance, they ought both to join.—4 Mod. 156. S. P. cited, and seems to intend S. C. that they may both join and seems to be admitted by the court.

46. A. promised B. the wife of C. that if B. would procure C. to levy a fine of such lands, that *he would give the wife a riding suit*. Roll Ch. J. said it was adjudged that the baron and feme cannot join in an action for breach of this promise. Sty. 298. Mich. 1651. in the case of Cotterel v. Theobalds.

See tit. Actions (U) pl. 19. and (Z) pl. 12. Fawcett v. Child e contra.

47. A. promised B. that if B. would marry M., A's sister, that he would make good a legacy given to M. by her father's will, and would also give to her 40 l. at her age of 18. This promise

was made to B. and for B.'s benefit, and the sole consideration arises from B.'s marrying M. and so the action ought to be brought by B. only. Sty. 297. Mich. 1651. B. R. Cottrel v. Theobalds.

48. A. in consideration of his daughter's diet, and being taught needle-work by the wife, and of a bond to be entered into by the husband to J. S. promises to give them so much; they may join. 2 Sid. 138. Hill. 1658. B. R. Fountain v. Smith.

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Keb. 733.
pl. 10. S. C.
but S. P.
does not
appear.—

Ibid. 791. pl.

47. S. C. &

S. P. held

accordingly,

and per

Hyde, tho'

it be found

that they both

kept the house,

yet the wife

does it only as

servant, and

the interest is

only his; to

which Twifden

agreed, and

judgment was

stayed.

So saying of

an inn-keeper's

wife, that she

was a whore, &c.

and had a

bastard by T.

per quod he

lost his custom,

ad damnum

ipforum, was

not good; for

they should

not join in the

per quod, and

yet, the words

being actionable

in themselves,

they might

join in the

action; and

judgment was

stayed. 2

Keb. 387. pl.

63. Trin. 20

Car. 2. B. R.

Harwood v.

Hardwick.

For words

not actionable

in themselves,

but only in

respect of

collateral

damages, being

spoke of the

wife, the baron

must bring

action alone,

and if the

wife be

joined with

him, the

judgment

will be

arrested

for it, though

after verdict.

Sid. 346. pl.

11. Mich. 19

Car. 2. B. R.

Anon.

In action

for words

by baron

and feme,

after verdict

it was

moved in

arrest of

judgment,

that the

conclusion

was ad

dammum

ipforum,

and 3

justices

held the

conclusion

of the

count to

be well,

which

Wythens

J. denied;

for he

said, if an

inn-keeper's

wife be

called a

cheat, and

the house

loses the

trade,

the husband

has an

injury by

the words

spoke of

his wife,

but the

declaration

must not

conclude

ad

dammum

ipforum. 3

Mod. 120.

Hill. 2 &

3 Jac. 2.

B. R.

Baldwin

v. Flower.

The action
in the prin-
cipal case
was for bat-
tery of the
feme, and
tearing her
coat, and was
laid ad damnum
ipforum, and
therefore judg-
ment was said.
Sid. 224. Stanton
v. Hobart.

50. In actions for torts that will survive to the wife after the death of the baron, the wife shall be joined, and in no other case; per Twifden J. Sid 224. pl. 14. Mich. 16 Car. 2. B. R. Stanton v. Hobart.

51. In action of battery by the husband and wife for imprisonment of the wife till he had paid 10l. exception was taken that the husband and wife could not join; sed non allocatur; and judgment for the plaintiff. 2 Keb. 230. pl. 4. Trin. 19 Car. 2. B. R. Brown v. Tripe.

51. In action of battery by the husband and wife for imprisonment of the wife till he had paid 10l. exception was taken that the husband and wife could not join; sed non allocatur; and judgment for the plaintiff. 2 Keb. 230. pl. 4. Trin. 19 Car. 2. B. R. Brown v. Tripe.

52. Case by husband and wife against an executor, upon a promise by his testator after coverture, in consideration of the marriage had at his request, to pay 8l. per annum to the wife during the coverture. After a verdict it was moved, that it should have been brought by the husband alone, because the whole benefit is to him, the promise being made since the marriage. Judgment was stayed, but on moving it again it was adjudged, that it is in the election of the husband to bring the action in his own name; or to join his wife. Allen 36, 37. Hill. 23 Car. B. R. Hilliard v. Hambridge.

53. *Trover* was brought by baron and feme of 100 *load of wood of the feme*, and the *conversion was laid after the marriage*. It was moved, that she ought not to have joined with her husband in the action. But the court held, that in regard the *trover was laid to be before the marriage*, which was the inception of the cause of action, she might be joined; and Hale said, the husband might bring the action *alone, or jointly* with his wife; and the plaintiff had judgment. Vent. 260. Trin. 26 Car. 2. B. R. Batmore v. Graves.

54. It was held by Saunders Ch. J. that baron and feme ought not to join in trespass for an *assault on the feme*, if the same were *with her consent*; for where they join the action survives. Now here, if the husband dies, the wife cannot proceed, or begin de novo with this action, because it was with her own consent, and in such case therefore the husband may, and ought to bring the action alone upon his special case; for though the wife consent, that will not excuse the defendant, for she hath not potestatem corporis sui; and Holt said, that the very last assises the Ld. Ch. Baron over-ruled him in that very exception, and so said serjeant Jefferies, that the Ld. Hale had done; but the Ld. Ch. J. Vaughan did allow it, and always held they could not join. 2 Show. 255. pl. 262. Hill. 34 & 35 Car. 2. B. R. Rogers & Ux. v. Goddard.

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55. Judgment in C. B. in trespass by husband and wife for *taking away their goods* was reversed, because the wife ought not to join. 7 Mod. 105. Mich. 1 Annæ B. R. Wittingham v. Broderick.

56. *Case by husband and wife for maliciously indicting the wife of a riot*; the husband counted that his wife was of good reputation, and that this was with intent to lessen it, and that he was put to great charge. The court held it no scandal to be guilty of a trespass, and as to the other, they inclined, that the husband alone ought to have brought the action, because he alone could be put to the charges; but they delivered no positive opinion. 7 Mod. 104. Mich. 1 Ann. B. R. Harwood v. Parrot.

57. The plaintiffs brought an action of assault and battery for a *battery committed on them both*; judgment by default, and a writ of inquiry was executed the 17th of May 1705, and intire damages, viz. 7l. 10s. was given; and on the return of the writ of inquiry, judgment was arrested, because the wife cannot be joined in an action with the husband for a battery on the husband, 2 Ld. Raym. Rep. 1208. Mich. 4 Ann. Newton & Ux. v. Hatter.

58. Feme covert sued singly *upon the statute of distributions*, and a prohibition was moved for, because it was a property so vested in the husband that he might release it; but the court denied it, because this was a *chose en action which shall survive to the wife*, and the joining of the husband would be only for conformity; and that though the spiritual court ought to conform their proceedings to the rules of the common law, yet that is in matters

Baron and Feme.

of substance, and not of form, as this most certainly was. 10 Mod. 63. Mich. 10 Ann. B. R. D'aeth and Baux.

59. Husband and wife join in action for money lent by him and his wife by his consent; per cur. the wife ought not to be joined unless there had been an express promise made to her, or unless the cause of action did arise on her skill or knowledge. 8 Mod. 199. Mich. 10 Geo. 1. King v. Basingham.

(T. 2). Actions, &c. commenced by or against Feme Sole, who marries pending the Action, &c.

1. **I** F one of the demandants takes baron pending the writ, it shall abate for all. Thel. Dig. 185. lib. 12. cap. 12. f. 2. cites Mich. 9 E. 3. 470. and 29 E. 3. 22. Contrary it was adjudged Mich. 12 E. 3. Brief 258.

And so it shall be if it was after the severance; per cur. Thel. Dig. 185.

2. In *scire facias* by 2 parceners, the one was summoned and severed, and the tenant said that she who was severed took baron pending the writ, and before the severance, by which all the writ abated. Thel. Dig. 185. lib. 12. cap. 12. f. 2. cites Pasch. 32 E. 3. Brief 292.

lib. 12. cap. 12. f. 2. cites Pasch. 32 E. 3. Brief 292. — But it was adjudged, that if one of the demandants who is severed takes baron after the last continuance, the writ shall not abate. Thel. Dig. 185. lib. 12. cap. 12. f. 2. cites Trin. 39 E. 3. 21. but adds quære.

[91] 3. Writ shall not abate by the taking of baron after verdict in pais, and before the day in bank, and judgment. Thel. Dig. 185. lib. 12. cap. 12. f. 5. cites Mich. 4 H. 4. 1.

4. But Gascoign said that it has been a great question, if a feme appellant who takes baron after judgment, and before execution, may pray execution. Thel. Dig. 185. lib. 12. cap. 12. f. 6. cites Hill. 11 H. 4. 48. but says that Hussey and Brian were clearly of opinion that she might demand execution in such case, notwithstanding the espousals. Mich. 21 E. 4. 87.

Br. Ley Gager, pl. 32. cites S. C.

5. Feme covert, who was sole the day of the writ purchased, *waged her law of non-summons* in formedon, without the baron. Br. Coverture, pl. 18. cites 12 H. 4. 24.

6. If it be pleaded, that the feme plaintiff has taken baron pending, &c. *she may say that this baron is now dead, or that divorce is made, and that she is now sole.* Thel. Dig. 185. lib. 12. cap. 12. f. 7. cites 9 H. 5. 1.

Thel. Dig. 185. lib. 12. cap. 12. f. 4. cites S. C. and Mich. 4 H. 4. 55.

7. If a feme is contracted to a man, and brings action, and pending it she is compelled by the spiritual court to marry him, yet her writ shall abate. Br. Brief, pl. 758. cites 7 H. 6. 14, 15. per Straunge.

8. Feme executrix made a letter of attorney to the plaintiff, to whom the testator was indebted, to recover and receive a debt due by A. to the testator, and then marries; this is not any countermand or revocation of the suit, and the writ is not abated, but only

only abateable. 1 Le. 168. pl. 235. Mich. 30 & 31 Eliz. C. B. Lee v. Madox.

9. If a *feme sole* brings trespass, and recovers, and a writ of enquiry of damages is awarded, and before the return thereof the plaintiff takes husband, and after the writ, and judgment given thereupon, without any exceptions taken by the defendant, he shall not have advantage of this in a writ of error, because the writ was only abateable by plea. Roll. Abr. tit. Error, (M. b) pl. 2. Mich. 40, 41 Eliz. B. R. between Smyth and Odyham, adjudged.

10. Feme, pending the writ against her, takes husband. This doth not abate the writ; but the recovery against her upon the first writ is good. Agreed. But by Doderidge J. if, after the original process sued and before the return she takes husband, this shall abate the writ. Quære, 2 Roll. Rep. 53. Mich. 16 Jac. B. R. in Heydon and Miller's case.

11. After imparlance it was pleaded in bar, that the plaintiff took husband; on which issue was taken by the plaintiff, to which the defendant demurred; and by Twisden, that is the best way; for if it had been tried, it had been peremptory, but now only respondeas ouster, which was agreed, Hyde absente. Keb. 632. pl. 118. Mich. 15 Car. 2. B. R. Phillips v. Taylor.

12. If feme sole, plaintiff, takes husband, it must be pleaded after the last continuance; for otherwise the defendant depends on his first plea, and waives the benefit of this new matter. G. Hist. C. B. 84.

and therefore must plead in time; for she cannot by her own act destroy another man's action, neither can the husband, unless he comes in time; for the action was well commenced. G. Hist. of C. B. 199.

13. If an action be brought in an inferior court against a feme sole, and pending the suit she intermarries, and afterwards removes the cause by habeas corpus, and the plaintiff declares against her as a feme sole, she may plead coverture at the time of the suing the habeas corpus, because the proceedings are here *de novo*, and the court takes no notice of what was precedent to the habeas corpus; but upon motion, on the return of the habeas corpus, the court will grant a *procedendo*; for though this be a writ of right, yet where it is to abate a rightful suit, the court may refuse it, and the bail below, to this suit, which by this connivance he is ousted of, and possibly by the same means of the debt. G. Hist. of C. B. 198.

next. — 1 Salk. 8. pl. 20. Mich. 6 Ann. B. R. Hetherington v. Reynolds, S. accordingly.

S. P. for the husband which the takes is attached with the action,

11 Mod. 142. pl. 14. Etherington v. Reynolds, S. C. The court was inclined to give judgment for the defendant; but as an indulgence for the equity of the cause, it was adjourned to Hill term C. ruled ac-

* [92]

(T. 3) Actions, &c. by Baron and Feme *de Facto*, or one of them, in respect of the other.

1. IT was said and held, that in *cui in vita*, or other action to be brought of the feme's own possession, it is no plea to say, *me un-*
quo

que accouple, &c. and he shall demand simul cum viro suo, who is her baron in fact, and in possession. Thel. Dig. 119. lib. 11. cap. 2. f. 11. cites Mich. 50 E. 3. 19.

2. Where the statute of 6 R. 2. cap. 6. is *where a woman is ravished, the husband, &c. of such woman shall have the suit, &c.* this is strict, and shall be intended the baron in possession, though there be good cause of divorce; for he is her husband till divorce be had. Br. Parliament. pl. 89. cites 11 H. 4. 14.

3. *Contra where the marriage is void*, for there he is not her husband, and therefore there ne unques accouple in lawful matrimony is no plea by the best opinion. Ibid.

4. *Contra in appeal by feme of the death of her husband, or in dote petita*, for those are by the common law. Ibid.

(T. 4) Of Judgments confessed by or to Feme Solé, who marries before Entry of them.

1. WARRANT of attorney to confess judgment to a feme sole, who married before judgment entered, *whether it could now be entered, and how*, was the question. It was agreed it could not be entered for the husband, for that is beyond the authority given. The course is to make affidavit of the debts not being satisfied, and now the wife could not make such affidavit; for the money might have been paid to the husband, nor could the husband's affidavit serve, because it might have been paid to the wife before marriage; but it seems the point may be cleared by a *several affidavit of each in his time*; and Holt said they had better enter it in the wife's name as feme sole, but nothing was done. 12 Mod. 383. Pasch. 12 W. 3. Reynolds v. Davis.

[193] (U) Actions against Baron and Feme. What may be against both.

* See tit. Actions (L) pl. 7. S. C. and the notes there. † Cro. J. 661. pl. 11. Berry v. Nevis in cam. scacc. Hill. 20 Eliz. S. C. and judgment reversed.

[1. IF a trover and conversion of goods be brought against baron and feme, in which it is supposed that they found the goods, and converted them to their own use; this is not good, for presently by the conversion of the feme; it is to the use of the baron, and not to the use of the feme. Fr. 8 Car. B. R. between * REAMES AND HUMPHRYS, adjudged in arrest of judgment. Intratur, Hill. 7 Car. Rot. 1202. and then was cited one † NEVES'S CASE, where such a judgment was reversed in camera scaccarii for this error.]

If feme covert takes my sheep and eats them, or other goods and converts them, trover lies against the baron and feme, and I may suppose the conversion in the feme only, viz. the tort, though they cannot bring trover, and suppose the conversion in both, quod fuit concessum per tot. cur. Yelv. 166. Mich. 7 Jac. B. R. in case of Draper v. Fulks. — Mar. 60. pl. 94. Mich. 15 Car. in case of Hodges v. Simpson, it was said by Jones J. that there may be a conversion by the wife to her own use, as in the

the principal case there, where the *trover* was of barley, if she bakes it into bread and eats it herself; and Brampton Ch. J. said, that a wife has a capacity to take to her own use; for there must necessarily be a property in her before the husband can take by gift in law, and therefore as to this point the case was adjourned.—Jo. 443. pl. 4. S. C. adjudged for the plaintiff. —The laying the conversion ad usum ipsorum, though naughty, is made good by the verdict. Mar. 82. pl. 134. Pasch. 17 Car. Anon.

An action of *trover* is brought against baron and feme, for a conversion during the coverture by the wife. And it was said by the court, that it was good; for by Jones J. although a feme covert cannot make a contract for goods, not be charged for them, yet she may convert them, &c. Noy. 79. Newman v. Cheney.—Lat. 126. Pasch. 2 Car. S. C. Whitlock J. accorded. Crew Ch. J. spoke doubtfully, and Doderidge assented.

2. Writ of *trespass* lies against baron and feme.—Thel. Dig. 45. lib. 5. cap. 4. f. 9. cites Hill. 12 E. 3. Brief 676.

3. Writ of *mesne* against baron and feme, supposing that the plaintiff held of them in right of his feme, and so supposing the baron and feme to be mesne, and not the feme, &c. and held good. Thel. Dig. 116. lib. 10. cap. 26. f. 17. cites Mich. 13 E. 3. Brief 642. & 13 R. 2.

4. A writ upon the statute of labourers was maintained against the baron and feme, upon retainer of a servant made by the baron and feme. Thel. Dig. 45. lib. 5. cap. 4. f. 15. cites Pasch. 29 E. 3. 35. Thel. Dig. 116. lib. 10. cap. 26. f. 12. cites S. C.

5. A man shall not have action of *debt* against the baron and feme, upon contract made by them. Thel. Dig. 45. lib. 5. cap. 4. f. 12. cites Hill. 34 E. 3. Brief 923. & Pasch. 2 H. 4. 19.

6. Detinue of 10l. of flax, against baron and feme, and counted of bailment to both to rebail, &c. to the damage of five marks, and because it is the detinue of the baron only, therefore the writ was abated. Br. Detinue de Biens, pl. 22. cites 38 E. 3. 1.

7. Writ of detinue does not lie upon a bailment made to the baron and feme. Thel. * Dig. 45. lib. 5. cap. 4. f. 10. cites Hill. 38 E. 3. 1.

But where the bailment was to the first baron, and the com-

ing to the hands of the feme as executrix, the writ ought to be brought against her and her second baron jointly. Thel. Dig. 45. lib. 5. cap. 4. f. 10. cites Trin. 39 E. 3. 22.

8. It was held, that writ of *conspiracy* does not lie against baron and feme and a third person, supposing that they conspired, &c. Thel. * Dig. 116. lib. 10. cap. 26. f. 13. cites Hill. 38 E. 3. 3. but says that Morris durst not demur thereupon. Pasch. 49 E. 3. 19.

Nor against baron and feme. Thel. Dig. 45. lib. 5. cap. 4. f. 16. cites S. C.

9. If writings are bailed to a feme sole, and she takes baron, the action is well brought against both, and shall not be compelled to bring it against the baron alone. Br. Charters de Terre, pl. 38. cites 39 E. 3. 17.

* [94]

10. It was adjudged that writ of *covenant* does not lie against baron and feme, upon covenant made by them, by deed indented. Thel. Dig. 45. lib. 5. cap. 4. f. 18. cites Mich. 45 E. 3. 11.

11. A man shall not have action upon obligation made by them two. Thel. Dig. 45. lib. 5. cap. 4. f. 12. cites Hill. 8 R. 2. Brief 930. and Hill. 43 E. 3. 10.

12. Writ of *detinue* does not lie against baron and feme, upon coming to their possession by *trover*. Thel. Dig. 45. lib. 5. cap. 4. f. 10. cites Mich. 13 R. 2. Brief 644.

13. If a man recovers by assise against a feme sole, and after she takes baron, he shall not have *redisseisin* against the baron and feme. Thel. Dig. 45. lib. 5. cap. 4. f. 22. cites Mich. 9 H. 4. 5.

14. Writ of trespass done by the feme before the marriage, and writ of account of receipts made by her before the marriage, lies against the baron and feme. Thel. Dig. 45. lib. 5. cap. 4. f. 24. cites Mich. 4 E. 4. 26.

15. Debt lies of the rent upon a lease made to the baron and feme, and lies against both; so of waste; for she cannot waive the lease during the life of her baron. Br. Dette, pl. 217. cites 17 E. 4. 7.

Nov. 19.
S. C. judgment was arrested; for the wife shall not be sued for the debt of her husband.

16. Debt against husband and wife for 3l. 18s. and counted for 39s. upon a contract of the wife *dum sola*, and for 39s. more upon an *in simul computasset* with the husband. Upon nil debet it was found for the plaintiff, but judgment was stayed. Hob. 184. pl. 221. Revel v. Gray.

17. In case for words brought against husband and wife; the jury found the husband guilty, and the wife not. The court held the declaration ill; for this cannot be a joint speaking by husband and wife, and therefore they ought not to be joined in this action; and there ought to be several judgments and damages if you recover, viz. one against the husband, and another against the wife; but here it is helped by the verdict, and the judgment in effect is but against one of the defendants, and so judgment was given for the plaintiff. Sty. 349. Mich. 1652. B. R. Burchard v. Orchard.

18. Case was brought against husband and wife, for retaining a servant who departed without licence. At the end of the case is a note, that no notice was taken (the judgment being given upon other matter) that the action was brought against the baron and feme, and feme covert cannot make a retainer or contract; but says, that perhaps the receiving and keeping him without any contract is a trespass, whereof a feme covert may be guilty, sufficient to maintain this action against her. 2 Lev. 63. Trin. 24 Car. 2. B. R. Fawcett v. Beaver.

3 Keb. 602.
pl. 43. Honey v. Daniel
S. C. and agreed that feme executrix is not chargeable for waste by baron and feme. — Cro. C. 519. pl. 20. Mich. 14 Car. B. R. in case of Mounson v. Bourn, it was held, that if a man marries a feme executrix, and wastes the goods, it is a devastavit in the wife.

19. In debt on bond against baron and feme executors; the plaintiff counted of a devastavit by them, but adjudged against the plaintiff; because a feme covert cannot waste during the coverture, though the wasting of the baron shall charge her if she survives. 2 Lev. 145. Trin. 27 Car. 2. B. R. Horsey v. Daniel.

chargeable for waste by baron and feme. — Cro. C. 519. pl. 20. Mich. 14 Car. B. R. in case of Mounson v. Bourn, it was held, that if a man marries a feme executrix, and wastes the goods, it is a devastavit in the wife.

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20. Trespass against husband and wife. Upon not guilty pleaded, verdict for the plaintiff. It was moved in arrest, that the wife could not be charged for the trespass of the husband, no more than they can be charged for the conversion of goods *ad usum ipsorum*; but the court over-ruled the exception. Id. Raym. Rep. 443. Pasch. 11 W. 3. White v. Eldridge.

21. Covenant

21. *Covenant was brought* against baron and feme on a *lease to the feme dum sola*, wherein she covenanted to plant 20 oaks every year during the term on the premises. It was objected, that the wife ought not to be joined in the action for breach since the coverture; sed non allocatur; and judgment pro quer', and if the wife had *assigned dum sola*, the action would lie against both jointly. 6 Mod. 239. Mich. 3 Ann. B. R. Anon.

[X] [Actions.] What ought [to be brought against both.]

[1. *DEBT* for rent upon a lease for years made to baron and feme ought to be brought against both. * 17 Ed. 4. 7. 2 H. 4. 19. b. Dubitatur, whether it may be brought against the feme.]

* Br. Baron and Feme, pl. 61. cites S. C. per cur. and fo of waste.—

S. P. Br. Baron and Feme, pl. 29. cites 3 H. 4. 1. per Thim. for she may agree after the death of her husband; but Hank. contra; for if the plaintiff recovers, and the baron dies, execution shall be of the goods of the feme; or it may be, that the term shall be expired in the life of the baron, or that the feme will refuse after the death of her husband.

In debt for arrears of a lease for term of years, the plaintiff supp. sed, that he leased to the defendant 14 acres of land. The defendant said, as to 4 acres he did not lease, and as to the rest, that the plaintiff leased them to the defendant, and to his feme, who is in full life rot non d, &c. Judgment of the writ. But the opinion of the court was, that it was not a good way to plead so; for he ought to acknowledge a lease of 10 acres to him and to his feme, with an *aliquo loco* that he leased the 14 acres modo & firma, &c. Thel. Dig. 172. lib. 11. cap. 42. f. 24. cites Hill. 17 E. 4. 7.

Avowry because W. B. held certain land, out of which, &c. of one J. B. as of his manor of F. by herage, fealty, and esuage, viz. so much, &c. and conveyed the signory of the said J. B. to the defendant, and shewed how, and conveyed the tenancy to the plaintiff by que estate, and for homage of the plaintiff he avowed, &c. The plaintiff said, that at the time of the distress, nor ever after, he had nothing in the land, unless jointly with F. his feme of the giftment of W. B. to them and to their heirs, which F. is alive, and so the avowry ought to have been upon both. Judgment of the avowry; by which Catesby avowed upon the baron and feme. Br. Avowry, pl. 96. cites 7 E. 4. 27. Thel. Dig. 45. lib. 5. cap. 4. f. 14. cites Trin. 26 E. 3. 64. where it is said, that for arrears of rent reserved on a lease for years made to baron and feme, writ of debt may be brought against the baron alone, and also against both.

[2. But 43 Ed. 3. 11. b. is, that it lies against both; because it is for the benefit of the feme, and so 3 H. 4. 1.]

† Br. Debt, pl. 55. cites S. C.—

Br. Baron and Feme, pl. 29. cites S. C. but the reason is not given there.

[3. The same law where it is brought upon a lease for life made to them, the action shall be brought against both. 3 H. 4. 1.]

Br. Debt, pl. 55. cites S. C.—

Br. Baron and Feme, pl. 29. cites S. C. but says nothing as to the lease for life.

4. In writ of dower brought against guardian in chivalry, the defendant vouched to warranty, and the vouchee came and said, that he had nothing in the ward unless by reason of his feme not named, &c. and demanded judgment of the voucher, yet the voucher was adjudged good. Thel. Dig. 44. lib. 5. cap. 4. f. 4. cites 30 E. 1. Voucher 299.

So a writ of dower was adjudged good brought against the baron alone as guardian, who had nothing in

the ward but only a joint estate with his feme. Thel. Dig. 45. lib. 5. cap. 4. f. 5. cites Mich. 2 E. 3. fol. 43 & 58.

Writ of dower may be against the baron alone who has the ward in jure uxoris. Br. Voucher, pl. 143. cites 48 E. 3. 20. — Br. Baron and Feme, pl. 26. cites S. C. [but misprinted 30. in the large edition] and S. P. for there voucher does not lie. — S. P. Br. Baron and Feme, pl. 22. cites 47 E. 3. 9.

In *formacion* against A. who said, *that one was seized and in- feoffed B. to the use of D. feme of A. and that he took the profits in right of his feme, not named, &c.* and held no plea, per Brian. Thel. Dig. 45. lib. 5. cap. 4. f. 26. cites Hill. 3 H. 7. 2. and says, see the same year, fol. 13. and quære.

5. Writ of *contra formam feoffamenti* brought against the baron alone, who had nothing in the seigniorie unless with his feme, was abated. Thel. Dig. 45. lib. 5. cap. 4. f. 7. cites Trin. 31 E. 1. Jointenancy 35.

6. Where one is guardian in socage in right of his feme, the writ of account for the time before the marriage shall be brought against the baron and feme, and after the marriage against the baron alone Thel. Dig. 45. lib. 5. cap. 4. f. 11. cites 8 E. 2. Itin' Kanc' Brief 847.

7. Writ of *quare impedit* may be maintained against the baron alone, notwithstanding that he claims the advowson in right of his feme. Thel. Dig. 45. lib. 5. cap. 4. f. 13. cites it as the opinion of Hill. 7 E. 3. 302.

* It seems this should be (peten- tis.) — Fitzh. Jointenancy, pl. 13. S. C. is that the tenant pleaded jointenancy with his feme, &c. and the plaintiff maintained that he was sole tenant, and the others e contra. — In the like action the baron and feme joined. Hob. 189. pl. 233. but at the end of the case is a nota, that there was no mention that the action was brought by the husband and wife both, being only to recover damages.

8. Writ de *seffa ad molendinum* is abateable for jointenancy with his feme, not named ex parte * tenentis. Thel. Dig. 45. lib. 5. cap. 4. f. 8. cites Hill. 13 E. 3. Jointenancy 13.

In *ravish- ment of ward, and ejectment of ward by guardian in socage*, it is no plea for the defendant to say, that he has nothing but only in right of his feme, not named. Thel. Dig. 45. lib. 5. cap. 4. f. 25. cites Hill. 26 E. 3. 65. Gard. 159.

The baron alone, without the feme, may have writ of *ravishment of ward*; but in † action against them, writ of ward shall be against both, by reason of the voucher. Br. Baron and Feme, pl. 26. cites 48 E. 3. 30. [20.] — Br. Voucher, pl. 143. cites 48 E. 3. 20. & S. P. because the defendant in writ of ward may vouch his grantor.

Ejectment of ward may lie against the baron alone who has the ward in right of his feme, without naming his feme. Thel. Dig. 45. lib. 5. cap. 4. f. 20. cites Trin. 48 E. 3. 20.

Adjudged in writ of ward brought against baron alone, Mich. 2 E. 3. 42. and so agrees Mich. 18 E. 3. 37. that jointenancy with his feme is a good plea in abatement of writ of ward; and so agrees Trin. 14 E. 3. Brief 279. and 48 E. 3. 20. But the contrary is adjudged in ravishment of ward, 26 E. 3. 65. by guardian in socage. Thel. Dig. 45. lib. 5. cap. 4. f. 6.

† S. P. Br. Baron and Feme, pl. 22. cites 47 E. 3. 9.

Ibid. cites Mich. 45 E. 3. 11. and Mich. 3 H. 4. 1. it ought to be against both. Hill. 17 E. 4. 7.

10. A writ of *debt for arrearages of rent-charge* was maintained against the baron, he being tenant of the land charged in right of his feme, without naming his feme, viz. for the arrearages incurred after the coverture; but otherwise it should be for the arrearages before the marriage. Thel. Dig. 45. lib. 5. cap. 4. f. 14. cites Trin. 26 E. 3. 64.

11. In *assise* it was found that the baron and feme entered claiming as the right of the feme, and that the feme had not any right, nor any

any of her ancestors, yet the writ was abated by the not naming of the feme. Thel. Dig. 45. lib. 5. cap. 4. f. 17. cites 35 Aff. 5.

* 12. If a man bails goods to a feme sole, and she takes baron, Action of detinue lies against both; quod nota. Br. Baron and Feme, pl. 56. cites 39 E. 3. 17. per cur.

Of goods bailed to the feme to deliver to her baron, which

she does, the action shall be against the baron only. Br. Bailment, pl. 10. cites 2 H. 4. 21. — In case of detainer by the feme, the action shall be against the baron; per cur. obiter. Le. 312. pl. 433. Trin. 32 Eliz. C. B.

13. In recordare the defendant avowed upon the baron, in right of A. his wife, because land was given in tail, rendering 20l. rent, and conveyed the land to A. feme of the plaintiff, and for the rent avowed upon the baron only, and he prayed aid of the feme, and had it. They came and pleaded in abatement of the avowry, because it was not made upon the feme, and because he had aid of her before, therefore he was ousted of it, and the feme was ousted also, though she did not come till now; quod nota. Brooke says, quod miror! For it seems that the avowry is erroneous by matter apparent, which is cause of repleader, or to have writ of error at this day. But see that after issue had, the avowry for homage may be made upon the baron only; but here is no mention of any issue. Br. Avowry, pl. 74. cites 39 E. 3. 15.

14. If a man is bound in a statute-merchant to baron and feme, or to a feme alone, who takes baron, and the baron releases all actions and executions, audita querela upon execution sued by the baron and feme, shall not be sued against the baron and feme, but against the baron only. Br. Joinder in Action, pl. 92. cites 48 E. 3. 12.

Br. Audita Querela, pl. 11. cites S. C. — Br. Baron and Feme, pl. 24th cites S. C. — Br. Brief, pl. 80. cites S. C.

15. If a man marries a feme who is in debt, the writ of debt shall be brought against both. Thel. Dig. 45. lib. 5. cap. 4. f. 19. cites Mich. 49 E. 3. 25.

Keb. 281. pl. 84. Pasch. 14. Car. 2. B. R. Robinson

v. Hardy, S. P. ruled accordingly. — Ibid. 440. pl. 32. Hill. 14 & 15 Car. 2. B. R. Hardy v. Robinson, S. C. & S. P. held accordingly, and cites 37 Aff. 11.

A feme sole is indebted and marries; she and her husband shall both be sued for her debts, living the wife; but if she dies, the husband shall not be charged with her debts afterwards, unless judgment was had against him and his wife during the coverture; for then he shall be charged by such recovery after her death. F. N. B. 120 (F).

Indebitatus for money due from the wife dum sola, was brought against the baron only, and therefore judgment was staid; and after, by prayer of the plaintiff, reversed for expedition. Keb. 440. pl. 32. Hill. 14 & 15 Car. 2. B. R. Hardy v. Robinson.

16. Trespass for not repairing of certain banks, by reason of certain land which the defendant has in D. &c. by which the land of the plaintiff was surrounded; and because the defendant had nothing in the land, by which, &c. but in right of his wife not named, the writ was abated; for they ought to have been joined, &c. Br. Baron and Feme, pl. 32. cites 7 H. 4. 31.

Thel. Dig. 45. lib. 5. cap. 4. f. 21. cites S. C. — Br. Joinder in Action, pl. 23. cites S. C. —

Br. Action sur le Case, pl. 36. cites S. C.

17. In *detinue of charters* by one, if it appears by the count that one of the charters concerns the inheritance of his feme, who is not named, the writ shall not abate, but only for this charter, by the opinion of the court. *Quære*; for this exception goes only to the writ; but if it had been to the action, it had been clear. Thel. Dig. 238. lib. 16. cap. 10. f. 50. cites Pasch. 38 H. 6. 29.

So if baron and feme make disseisin and feoffment to their use, assise lies against both, and the parrancy is in both in jure uxoris. Br. Parnour de Profits, pl. 22. cites 4 E. 4. 17.

18. If a feme sole disseises me, and makes a feoffment to her use and takes baron, I shall have assise against both, as parrour in jure uxoris. Br. Parnour, pl. 22. cites 4 E. 4. 17.

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So if a feme lessee for life takes baron, and after lessee confirms the estate of the baron to have for his life, by which the baron has a reversion for life, yet if waste be committed after, the action lies against baron and feme, and this reversion is not any impediment. 17 E. 3. 68. b.

19. Where a lease for years is made to baron and feme, reserving rent, the writ of waste shall be brought against both. Thel. Dig. 45. lib. 5. cap. 4. f. 23. cites Hill. 17 E. 4. 7.

And so it shall be if the baron and feme, before the marriage, be co-heirs and parceners, if partition be not made before the marriage. Thel. Dig. 44. lib. 5. cap. 4. f. 1.

20. In every writ where inheritance or franktenement is demanded, and also where seisin of inheritance is to be recovered, if in baron be seised thereof in right of his feme, or jointly with his feme, by purchase made before marriage or afterwards, the writ ought always to be brought against both jointly. Thel. Dig. 44. lib. 5. cap. 4. f. 1.

And it is so also if the land descend to them in parcenary after the marriage. Ibid. But if they be tenants in common at the time of the marriage, or if tenancy in common descends to them after the marriage, Theloll makes a quære how the writ shall be brought; and says, it seems to him, that one writ ought to be against the baron alone for the moiety, and another against the baron and feme for the other moiety. Thel. Dig. 44. lib. 5. cap. 4. f. 2.

21. Debt against baron and feme, upon a contract for silks bought of the plaintiff by the feme for her own wearing, and for the money which the feme agreed to pay for the same the action was brought. Three justices held, that such contract during coverture would not bind the husband; but admitting it would, yet the feme ought not to be joined in the writ. 4 Le. 42. pl. 113. Mich. 19 Eliz. C. B. The earl of Derby's case.

22. A lease was made to try a title of a house, and the lessee enters into the house, and the wife of the said former lessee ousts him and farms the house; and after the husband came there, yet the ejectione firmæ was brought against the husband only, and well. Noy 48. Clements v. Cassye.

23. The husband being seised of a house in right of his wife for her life, they leased the same to the defendant, who burned the house. The husband brought an action alone against the defendant for waste done to the house; after a verdict, it was moved that he could not maintain this action alone, because the wrong was done to the estate which he had in right of his wife, and it might

might so happen that no loss or injury might accrue to him, for no action might be brought against him by the lessor in the lifetime of his wife; and if so, then he is not chargeable, and it never can be brought against him alone, and therefore the wife ought to be joined in the action, but the court doubted; and adjournatur. Cro. Eliz. 461. (bis) pl. 12. Pasch. 38 E. B. R. Jeremy v. Lowgar.

24. *Trover* by feme, *conversion* by husband and wife; per cur. this action sounds in trespass, and shall be brought against both, and not against the husband only. Le. 312. pl. 433. Trin. 32 Eliz. C. B. Marsh's case.

25. A feme sole being proprietor of a parsonage, married, and then the husband alone brought an action upon the statute 2 Ed. 6. for treble damages against a parishioner for taking away his tithes after he had set them out. Whether the husband may sue alone the court would advise; for though he may sue alone for personal things, yet where the statute saith the proprietor shall have the action for the not setting forth, &c. the husband is not intended to be the proprietor, but the wife, and therefore she ought to join. 2 Brownl. 9. Mich. 8 Jac. Ford v. Pomeroy.

husband and wife ought to have joined in the action, because it is not for a thing in possession; and if the husband dies, the wife shall have the damages, and not the executor of the baron.

S. P. Where the baron was possessed in right of his wife, and she being joined with him in the * action, it was objected that the tithes being personal chattels, which belonged to the baron only, she ought not to be joined; sed non allocatur; for the feme being termor, the baron is possessed of them in her right, and the action is given to the proprietor or farmer, &c. and so the action is well brought in both their names, and judgment for the plaintiff; and afterwards error was brought, and assigned in the point of law, and the judgment was affirmed. Cro. E. 608. pl. 9. & 613. pl. 1. Trin. 40 Elis. B. R. Beadle v. Sherman. — 13 Rep. 47, 48. S. C. held accordingly. — Mo. 912. pl. 1288. S. C. and that it lies for the baron alone. — Jenk. 279. pl. 2. S. C. adjudged and affirmed in error. — S. C. cited 2 Inst. 250. — S. P. Arg. 2 Mod. 270.

It was adjudged per tot. cur. (absente Richardson) that where baron and feme brought debt upon the statute 2 E. 6. for not setting out tithes, whereof the baron and feme were proprietors, that the action well lay; but when they bring other actions of tithes set out from the 9 pars, being tithes arising from lands in a rectory which appertains to them; the feme in such cases ought not to join with her baron. Jo. 325. pl. 5. Mich. 9 Car. B. R. Anon.

Noy. 136. Hill. 7 Jac. S. C. but states it, that the baron and feme were lessees of the parsonage, and says it was resolved that the

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26. A promise is made by baron and feme, on a consideration paid to them for discharge of an annuity payable to the feme during her life. The wife dies; an action is brought against the baron, and counted of these promises by the husband and wife, and sets forth a breach; it was moved that the action lies not, for that the promise of a feme covert is void; but by Ley Ch. J. and Doderidge, the feme being dead the action lies, and the naming her promise is void, but otherwise if she had been alive; and Ley said, that if demurrer had been joined upon it, it had been ill, but not now after verdict. Palm. 312, 313. Mich. 12 Jac. B. R. Riley v. Stafford.

27. Case for negligent keeping the fire, by which the house of the plaintiff was burnt, lies only against the patrem familiæ, and not against the wife by the custom of the realm. See Actions (B) pl. 7. Mich. 1 Car. Shelly v. Burr.

28. Case, &c. upon an infimul computasset, and also upon an indebitatus assumpsit for wares bought by the defendant; upon non assumpsit pleaded, the jury found that the wife dum sole was

indebted to the plaintiff for wares sold, &c. and that after her marriage with the defendant, he and his wife accompted with the plaintiff for the money due, and upon the accompt 9l. 13s. was found due to the plaintiff, which the defendant promised to pay; in arguing this special verdict, it was insisted for the plaintiff, that the debt of the wife is the debt of the husband, and he is to be charged in the debt and detinet, and that by this accompt with the husband, he has made his proper debt, and the jury having found an express promise of the husband, he may be charged alone; but it was answered, that the accompt does not alter the nature of the debt, but only reduces it to a certainty, and that this verdict does not warrant the second promise, which was for wares bought by the defendant, whereas the jury find they were bought by the wife dum sola, and they conclude to both promises, so that if either of them be not made good by the verdict, it is against the plaintiff; and to all this Roll agreed, and judgment was given against the plaintiff. All. 72, 73. Trin. 24 Car. B. R. Drue v. Thorn.

The action is brought against him as tenant, and not in respect of the estate,

and if he lets the land out again, the under lessee is chargeable in an action for his rent-charge. Holt's Rep. 106. S. C. — 1 Salk. 297. pl. 6. S. C. (though misprinted as 7 W. 3. instead of 7 Ann.) but S. P. does not appear.

29. If baron be seised of land in right of his wife, charged with a rent-charge, the action for the rent arrear shall be brought against the baron only, by reason of his taking the profits, for the rent is the profits of the land. 11 Mod. 169. pl. 6. Pasch. 7 Ann. B. R. in case of Billingsworth v. Spearman.

[100] (Y) What Things a Woman may make good after the Death of her Husband, and how, and e contra.

Br. Obligation, pl. 35. cites 4 H. 6. 5. S. C. & S. P. by Cockain, and that the feme bringing an action of debt thereupon as executrix to her baron is a waiver, but Brooke says quere. — Fitzh. Debt, pl. 24. cites S. C. accordingly by Cockain. — Br. Baron and Feme, pl. 70. cites S. C. and the feme may waive it.

[1.] If an obligation be made to baron and feme, the feme may refuse it after the death of her husband. 4 H. 6. 6. M. 5 Jac. B. adjudged, and by such waiver this is made an obligation to the baron only.]

Br. Resceit, pl. 130. cites S. C. & S. P. — Fitzh. Resceit, pl. 61. cites S. C. and 13 H. 6. S. P.

[2. If baron and feme join in a lease for life of the lands of the feme rendering rent, the feme may make it good by agreement after the death of her husband. 10 H. 6. 24. b. and shall have the rent.]

Fitzh. Resceit, pl. 61. cites S. C.

[3. The same law, if they join in a lease for years. 10 H. 6. 24. b.]

& S. P. accordingly. — Br. Resceit, pl. 130. cites S. C. but S. P. does not appear.

4. Husband

4. *Husband and wife were tenants in special tail, remainder to T. S. remainder over. The husband made a feoffment to uses, and died, and after his death the widow levied a fine.* Resolved by all the justices, absente Ley Ch. J. that here was a discontinuance made by the baron, and that the fine of the feme, before entry by her, has strengthened the discontinuance, so that now she cannot enter to be remitted; for the words of the statute of * H. 8. are, that the fine, &c. of the baron, shall not be any discontinuance, but that the feme may enter; yet it is a discontinuance till entry, as Doderidge J. said. 2 Roll. Rep. 311. Pasch. 21 Jac. B. R. Moor's case. Palm. 165. S. C. accordingly. * 32 H. 8. cap. 82. s. 6.

(Z) For what Things created during the Coverture, the Feme shall be charged after the Death of her Husband, by her Agreement or Disagreement.

[1.] If baron and feme accept a fine rendering rent, if she agrees to the estate after the death of the baron, she shall be charged with the rent. 50 Ed. 3. 9. b.]

[2. If a lease for years be made to baron and feme rendering rent, if after the death of the baron the feme agrees to the lease, debt lies against her for all the arrearages incurred in the life of the baron. 2 H. 4. 19. b. † 3 H. 4. 1.] Both these places cited are the S. C. † Br. Baron and Feme, pl. 29. cites S. C. but S. P. does not appear.—Br. Debt, pl. 55. cites S. C. but S. P. does not fully appear.

[3. But after the death of the baron she may disagree to the lease. 2 H. 4. 19. b.] Br. Baron and Feme, pl. 29. cites 3 H. 4. 1. [and which is part of the S. C.] that after the death of her husband she may agree to the lease.

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4. If baron aliens the land of his feme, and dies, and the feme accepts part in dower, this is a good bar in cui in vita. Br. Cui in Vita, pl. 15. cites 10 E. 3. If baron aliens the right of his feme, and the baron dies, and the alienee assigns the third part of the land aliened to the feme in dower, without deed, she is remitted, and not barred nor concluded. Contra if it be by deed or by record. Br. ibid. cites 17 Ass. 3.

5. Of all reservations, &c. depending upon the land leased to baron and feme by indenture, there the feme shall be bound if she agrees to the lease. Contrary of collateral covenant or obligation in the same indenture, to bind them in a sum in gross. Br. Coverture, pl. 11. cites 45 E. 3. 11. As re-entry, and I doubting the rent for non-payment, or a fine no mine penze, which are reserved upon the lease; but a grant to distrain in other land, or a covenant charging the person, and not the land leased, as to oblige themselves in 20l. for non-payment of the rent, or to give such surety as the counsel of lessor should devise, shall not bind her; and for that reason the writ was abated. Br. Covenant, pl. 6. [but neither of the editions cites any book.]—Br. Obligation, pl. 14. cites 45 E. 3. 11. that of a bond for a sum in gross, in the same deed, she shall not be charged.

Lease to husband and wife; they covenant to do no waste, or repair, &c. The husband dies; the wife survives, and holds in. If the wife commits waste, or not repairs the house, no action lies against the wife; but to such a lease she is tied to pay the rent, or perform a condition made by the part of the lessor, but not the covenants of the lessee. Br. wnl. 51. cites 28 H. 8.—She is punishable for waste done

done during the coverture. Arg. 2 Brownl. 71. Portington's case.—She is liable to repairs, and to a *nomine parna*, for non-payment of rent at the day, according to the covenants in the lease. Arg. 2 Roll. Rep. 63, 64. cites 45 E. 3. 11.

§ 2 Roll. Rep. 63. Arg. cites 45 E. 3. 11. S. P. and that so she shall be bound, if she had covenanted to repair the house.

Br. Cui in
Vita, pl. 20.
cites S. C.

6. Cui in vita, *supposing that the tenant had not entry unless by her baron, cui ipsa in vita contradicere non potuit. Port. said the baron and this his feme gave the land to T. N. in tail, rendering fealty and a rose; the baron died, and the feme distrained him for the same services, by which T. did to her fealty, and paid the rose, which she accepted; judgment si actio; and the opinion of the court was, that this is a good bar, by which she took issue that she did not accept the rose post mortem viri, Priest; and the others e contra.* Br. Barre, pl. 27. cites 21 H. 6. 24.

Br. Waiver
de Chofes,
pl. 10. cites
S. C.—
See tit.

Waste, (R)

pl. 3, 4, 5. 9. and the notes there.

7. If a man *leases for life to baron and feme, and the baron does waste and dies, if she occupies the land she shall answer for the waste of her baron. Contra if she waives the possession, and does not occupy it.* Br. Barre, pl. 27. cites 21 H. 6. 24. per Ascu. J.

S. P. Br. Cui
in Vita, pl.
13. cites 1
E. 4. 8.—
If baron and

feme, seized in jure uxoris, make an exchange, and the baron dies, and the feme agrees to the exchange, she shall be bound thereby. Br. Exchange, pl. 9. cites 9 H. 6. 52.—Such exchange is good, if the feme will agree to it after the death of the baron; per Keble. Kelw. 10. a. Hill. 12 H. 7.

8. If the baron and feme make exchange, he dies, and she enters and occupies, this is a bar to her; *contra if she waives it, and does not occupy.* Br. Barre, pl. 27. cites 21 H. 6. 24. per Newton.

If baron and
feme lease
land for life,
it is her
lease for
the time;
for by the
receipt of
the rent af-
ter the death
of the hus-
band, the
lease is

affirmed. Br. Receipt, pl. 70. cites 24 E. 3. 18.—S. P. per Keble. Kelw. 10. a. * Hill. 12 H. 7. obiter.—But if the lease be made by the baron only, and he dies, and she accepts the rent, such acceptance shall not bind her; for she was not privy, &c. Br. Cui in Vita, pl. 1. cites 26 H. 8. 2.—Br. Acceptance, pl. 1. cites S. C.

If a husband and wife make a lease for years, and she accepts the rent after his death, she shall be liable to a covenant. Agreed by counsel on both sides, and by the court. Mod. 291. pl. 37. Trin. 29 Car. 2. B. R. in case of Wootton v. Hele.

* [102]

S. P. admit-
ted, 2 And.
42. pl. 28.
Hill. 38 Eliz.
in case of
Marth v.
Curtis.

10. Where baron and feme join in a lease of the land of the feme, rendering rent, and the baron dies, and after the feme accepts the rent, she shall be bound; *contra where the baron alone makes a gift, or lease reserving rent, and he dies, the feme accepts the rent, there this shall not bind her; per Chocke.* Note a diversity, quod nullus contradixit. Br. Acceptance, pl. 6. cites 15 E. 4. 18.

11. If

11. If the baron and feme sell the land of the feme, and make a feoffment, and the vendee by the same indenture covenants to pay an annuity of 10l. to them during their lives, the baron dies, the feme accepts the 10l. this is no bar in cui in vita; for this is by covenant, &c. and not as reservation or rent. Br. Cui in Vita, pl. 1. cites 26 H. 8. 2.

But if the baron and feme make a feoffment rendering rent, and the feme accepts this rent, this

shall bind her in cui in vita. Ibid. — Br. Acceptance, pl. 1. cites S. C. Contra where the baron alone makes the feoffment with reservation, and the feme accepts the rent, this shall not bind her; for she was not privy, &c. Note a diversity. Ibid. — Br. Acceptance, pl. 1. cites S. C.

12. Husband and wife by indenture made a lease for years rendering rent; the lessee entered, and the husband died before the day of payment, and she before such day married a second husband, who accepted the rent at the day, and afterwards died. It was held by three judges, that the wife having by marriage resigned to her husband her power which she had of avoiding the term, and his acceptance of the rent, had made the lease good; but Brook J. e contra; the reporter says, ideo quære. D. 159. a. pl. 36. Pasch. 4 & 5 P. & M. Anon.

S. C. cited Arg. 2 Roll. Rep. 132. — It was held per cur. that by the acceptance of the 2d baron, she is concluded during the term. D. 159. Marg. Rot. 1587.

pl. 36. cites Pasch. 22 Eliz.

13. If feme covert and another, at her request, are bound in a bond for the debt of the feme, and after her husband's death she promises to save the other harmless against the bond, she is not bound. Godb. 138. pl. 164. Mich. 27 Eliz. B. R. resolved per tot. cur. in case of Barton v. Edmonds.

4 Le. 5. pl. 22. Mich. 29 Eliz. B. R. the S. C. but S. P. does not appear.

— 3 Le. 164. pl. 215. Edmonds's case, S. C. but S. P. does not appear.

14. A decree was made on the consent of a feme covert in court, on her being there examined by Finch C. and giving her consent in court, though no party to the bill. 2 Chan. Cases, 101. Pasch. 34 Car. 2. Paget v. Paget.

15. Where a feme covert agrees to join in a fine with her husband, or to make a surrender, though the husband dies before it is done, chancery will compel her to perform the agreement. 2 Vern. 61. pl. 52. Pasch. 1688. Baker v. Child.

16. Baron and feme agreed to an inclosure. She was bound by it, even as to her jointure; per cur. 2 Vern. 225. in pl. 206. Pasch. 1691. cites Lady Widdrington's case.

17. Provision was made for the wife, an infant, by the husband in lieu of her jointure by articles during coverture; after the death of the husband she enters on 46l. per ann. part thereof only, and was thereby held bound to perform the whole articles. 2 Vern. 225. pl. 206. Pasch. 1691. cited per cur. as Sir Edward Moseley's case.

Chan. Cases, 253. 255. Hill. 26 & 27 Car. 2. Maynard v. Moseley, S. C. where the court held, that

though the feme is not bound by her agreement during coverture, yet if, when a widow, she sells a cording to such agreement, she is bound by it. — S. P. but when her acting, when a widow, may be indifferently applied either to her former interest or to her agreement, she shall not be bound by it. 2 Chan. Cases, 26. Pasch. 32 Car. 2. Thomas v. Lane. — If she had a title prior to her agreement, she shall not be bound by her entry. Ibid. 27.

* [103]
18. In

MS. Rep.
Pasch. 2
Geo. Canc.
Sharpton v.
Hipsley.

18. In bill for fees, &c. The plaintiff was *solicitor employed in a suit by the husband and wife, for a term of years in the right of his wife, but the husband died and left no assets*, and the bill was to have a satisfaction out of this term so recovered and enjoyed at this time by the wife. Ld. Chan. said it is strong equity, that the plaintiff should have a satisfaction out of this term so recovered by his costs and pains, since the wife has the benefit of it, and consented to it; and decreed that the plaintiff have a satisfaction of his demands against the defendant out of the profits of this term, and that he be examined upon interrogatories what he hath received, and the defendant to pay the costs of this suit.

19. Baron, in right of his wife, was *seised in fee of a share in the New River water, and they both joined in a mortgage by lease for 1000 years by deed without fine, reserving a pepper-corn rent*. The baron died, and she when a widow received the profits, and paid the interest. The mortgagee brought his bill to foreclose the feme, and insisted, that her payment of the interest while a widow affirmed the lease. But the Master of the Rolls held, that this being the inheritance of the feme, there ought to have been a fine; that if there had been a *rent reserved*, her acceptance of it would have affirmed the lease; but that here is no acceptance, and the lease is of an *incorporeal thing*, out of which rent could not well be reserved; wherefore the *lease expiring by the death of the husband*, the mortgage is also thereby determined, and nothing remaining to foreclose; and this being admitted on both sides, and appearing upon the opening, his honour dismissed the bill, but without costs. 2 Wms.'s Rep. 127. Pasch. 1723. Drybutter v. Bartholomew.

MS. Rep.
Dutchess of
Hamilton v.
Inledon,
in the ex-
chequer.

20. Plaintiff prayed injunction to stay defendant's proceedings at law upon this case. Duke Hamilton brought an *ejectment in his own and his wife's name, for certain lands that descended to the dutchess during the coverture, and employed the now defendant as his attorney*. The duke died pending the suit, and the dutchess continued Mr. Inledon, attorney, to prosecute the suit, and now he has brought his action for all the money expended in that suit, as well in the duke's time as in the dutchess's, against the dutchess, and has recovered a verdict at law. It was argued, 1st, that it is matter of account. 2dly, That he has, by his answer, submitted to the judgment of the court, whether the dutchess ought not to pay it, and therefore he ought to stay till the court has determined it. He insists, that the suit did not abate, and therefore that it is still the same retainer, but the retainer is personally to the duke, and cannot affect the dutchess, but is a charge upon the administrator. He admits money received from the dutchess, but would apply that to discharge what was due in the duke's time, but it is a maxim, that what money is paid shall be applied according to the intent of the payer. It was argued e contra, that there was no admission of new retainer, but only says he proceeded upon her request. He denies that he was ordered to keep a separate account. 2dly, They admit that there is no assets of the duke's

duke's to pay it. As to the objection, whether the dutchess or the administrator be chargeable, is proper defence at law, and so was that matter, how the payments were to be applied. They moved for a new trial, and these matters were insisted upon, and it was denied by the whole court of common pleas. It is objected, that this is matter of * account, and the same may be said of every attorney's bill, but the law has provided another remedy, viz. to have it taxed. As to submitting to the judgment of the court, that is only whether the dutchess is chargeable, which is more proper for a court of law than equity, and it has been determined in the common pleas. This verdict cannot be set aside upon this bill, and then there is no use of an injunction.

Lord Ch. B. said, that this is not brought to be relieved against the verdict, but against the action. In actions that found in damages, if the party makes defence at law, he cannot afterwards have relief in equity. The only question is, whether at law he can recover this against the dutchess? This is proper to be determined at law, and it has been there debated and determined. If the judge who tried the cause had been mistaken in his opinion, you would have had a new trial. The dutchess has the benefit of what was done before the duke's death. We are not now determining the cause, but only whether we shall stop their proceedings, and I think we ought not to stop them. All attorneys bills are matters of account, and the proper method is to have them taxed, and he does not submit to account.

B. Price went away before the court gave their opinions, but told his brethren, he was of opinion against an injunction.—Baron Mountague said, that if this was the case of a common tradesman, who delivered goods after the husband's death, he could not recover what was due before; or suppose the dutchess had never employed Mr. Inclendon after the duke's death, then he could not have recovered against her, and desiring him to go on is a separate contract. This is a charge all in her own right, and he having recovered more than is confessed to be due in her time, he has recovered so much wrongfully, and therefore in conscience ought to stay execution.—B. Page thought there ought not to be an injunction; it is often a good rule, that when more is recovered than ought to be, this court will stay proceedings at law. If there has been dealings which cannot be discovered at the trial, it is proper for to be examined in a court of equity, but here is nothing in this case but what was proper for a defence at law. But here is no dispute whether paid or received, but only who is chargeable, and this has been determined by the Ch. J. of the common pleas, and agreed to by the whole court; for otherwise a new trial would have been granted, and shall we condemn their judgment upon a motion? As to the question, whether she is chargeable, suppose it had been a suit upon a bond made to the dutchess before marriage, would not that survive to her, and she have the benefit, then ought not she in conscience to pay the charges? She by her act has made it her debt; it was commenced for their joint benefit. Suppose the duke had bought a piece of silk for a gown

for the dutcheſs, and ſent it to the makers, muſt not ſhe pay for the making before ſhe can have it, yet it was originally the duke's debt. He has ſubmitted only to the ſtating of it in his answer. No injunction was granted.

(Z. 2) Feme bound by Laches or Forfeitures during the Coverture, or what Act of the Baron ſhall forfeit the Eſtate of the Feme:

And Brooke ſays, ſo ſee that ſhe may have cui in vita, notwithstanding the alienation and the entry; for the title of entry is given by the law for the alienation only, and the title of the feme is by the demife before † notice. Br. Cui in Vita, pl. 9. cites 11 Aff. 11. —† All the editions are ſo, viz. (notice) but it ſeems it ſhould be (nota.)

It appears by judgment in aſſiſe, that where *baron and feme are tenants for life*, the remainder to A. in tail, and the *baron aliens in tail*, and A. has iſſue and dies, the iſſue may enter for the alienation to his diſſimberitance, notwithstanding that the feme covert be alive, for ſhe ſhall have cui in vita after the death of her huſband. Br. Cui in Vita, pl. 10. cites 43 Aff. 17.

* [105]

Br. Forfeiture de Terres, pl. 35. cites 9. C. and that ſhe ſhall have it by petition, if it be in the hands of the king, and by cui in vita where it remains in the hands of him in reversion.

This ſhall bind the feme in whole right the baron held the land. Br. Coverture, in pl. 76. cites 3. C. by Martin.

It was agreed, that if lands are given to feme ſole on condition, and ſhe takes baron, who breaks the condition, the feme ſhall be bound. Mo. 92. pl. 239. Trin. 20 Eli. Anon. — If a feoffment be made, reſerving a rent, and if not paid in a month the rent to be doubled, and the feoffee dies, and the land deſcends to a feme covert, and the rent is not paid within the time, the forfeiture ſhall take place, though otherwiſe in caſe of an infant; for the ſtatute of Mer. ton, cap. 5. of non current uſuræ, &c. does not extend to a feme covert. Co. Litt. 246. b.

5. If feme tenant for life takes baron, and they are impleaded, and pray aid of a ſtranger, and the baron dies, he in the reversion cannot enter; for this is the act of the baron. Br. Baron and Feme, pl. 86. cites 15 E. 4. 29.

6. If a lease for life is made to A. the remainder to a feme ſole for years, and they inter-marry, and waſte is committed, and the leſſor brings an action of waſte, he ſhall recover as well the eſtate for

for years as for life; per Dyer Ch. J. 2 Le. 7. in pl. 7. 16 Eliz. C. B.

7. Feoffment to the use of a feme for life, she being sole at the time, remainder to the right heirs of their two bodies begotten, remainder to the right heirs of the feoffor in fee. They intermarry. Baron having tenants at will in the same land, devised the reversion in fee to his wife, *ita quod ſhe ſhall pay* his debts and legacies, *and perform his laſt will*, and by the same will devised that his tenants shall have his tenements for life, and dies; feme takes other baron, who ousts the tenants at will, this is no forfeiture of the remainder. Mo. 92. pl. 229. Trin. 20 Eliz. Anon.

But if the will had been on condition, that his laſt will ſhould be performed, it would have been otherwise. Mo. 92. pl. 229. Trin. 20 Eliz. Anon.

8. A. devised land to his wife during the minority of his son, upon condition that she shall not do waste during the minority of his said son, and dies; the wife takes a husband; the husband commits waste; per tot. cur. it is no breach of the condition. 2 Le. 35. pl. 46. Hill. 33 Eliz. C. B. Cobb v. Prior.

Lat. 20. cites S. C. — 2 Le. 48. pl. 62. S. C. in totidem verbis.

9. A. tenant for life, remainder in fee to M. a feme covert. A. levied a fine. The baron died. M. took a second baron. A. died. 5 years paſſi. The second baron dies. M. is barred, and not remedied by 32 H. 8. cap. 28. In this case a diversity was taken between a warranty and right to the land; as to the warranty, the feme cannot be conſtant thereof to avoid it, and therefore she does not submit her assent to her baron, and in such case the laches of the baron shall not prejudice her; but otherwise it is of right to the land which is manifest, and therefore the neglect of the second baron shall prejudice her; but notwithstanding this diversity, it was adjudged that the feme shall be bound in this case. D. 72. b. Marg. pl. 3. cites 43 Eliz. Whetstone v. Wentworth.

[106] D. 159. a. Marg. pl. 36. cites S. C. and ſays, that this diversity was vouched by Noy Attorney-General in Lent Reading, 1632.

10. If a feme be infeoffed, either before or after marriage, reſerving a rent, and for default of payment a re-entry; in that case the laches of the baron shall diſinherit the wife for ever. Co. Litt. 246. b.

11. If husband and wife, as in right of the wife, have title and right to enter into lands which another hath in fee, or in fee-tail, and such tenant dies ſeiſed, &c. in such case the entry of the husband is taken away upon the heir which is in by descent; but if the husband die, then the wife may well enter upon the issue which is in by descent; for that no laches of the husband shall turn the wife, or her heirs, to any prejudice nor loss in such case, but that the wife and her heirs may well enter where such descent is caſt during the coverture. Litt. ſect. 403.

These words are general, but are particularly to be understood, viz. when the wrong was done to the wife during the coverture; for if a

feme ſole be ſeiſed of land in fee, and is diſſeiſed, and then takes husband, in this case the husband and wife, as in the right of the wife, have right to enter, and yet the dying ſeiſor in that case shall take away the entry of the wife after the death of the husband; and the reason is as well, for that she herself, when she was ſole, might have entered and re-continued the poſſeſſion, as also it shall be accounted her folly that she would take such a husband which would not enter before the descent. Co. Litt. 246. a. — But there if the woman were within age at the time of her taking of husband, then the dying shall not, after the deceaſe of her husband, take away her entry, becauſe no folly can be accounted in her, for that she was within age when she took husband, and after coverture she cannot enter without her husband, all which is implied in the ſaid &c. Co. Litt. 246. b.

Per Doderidge J. in some cases the heir is bound, and in some he is not. If *feme copyholder takes baron, who makes a lease for years, this binds the wife for ever; but if she was married*

12. *Feme copyholder* takes baron; baron makes a lease for years, and dies, and the wife dies. Whether the forfeiture continues against the heir of the feme? Chamberlaine J. puts a difference between *condition collateral* as this, and *cutting trees*; this does not bind the feme after the decease of the baron, but if baron forfeits for *non-payment of rent*, it is otherwise; and Doderidge J. put the case, that if the *lessor recovers against the baron in waste*, and baron dies, the feme shall not avoid it; but if the baron *makes feoffment*, and the feoffee enters, and the baron dies, the feme shall avoid it; but if the baron commits forfeiture for non-payment of rent, the feme shall not avoid it if the *lord enters in the life of the baron*, but if not it is otherwise. 2 Roll. Rep. 344. Trin. 21 Jac. B. R. in case of *Savern, alias Saben v. Smith*.

when the copyhold came to her, it is otherwise. 2 Roll. Rep. 361. S. C. *Savin, alias Sabin v. Smith*. — 2 Roll. Rep. 372. S. C. judgment for the heir of the feme nisi, &c. — Palm. 383. S. C. the forfeiture does not bind the feme, and judgment accordingly, nisi, &c. — 4 Cro. C. 7. S. C. adjudged that it should not bind, and affirmed in error as to that point, but other errors being assigned, the court would advise. — By death of baron the forfeiture is purged. Godb. 344. in pl. 438. S. C. adjournatur.

If the husband denies to pay the rent, or to do suit at court, these are present forfeitures which shall bind the wife, for they are things that the lord must of necessity have, but a lease is no great prejudice to the lord, and it is good to advise of it. Cro. E. 149. pl. 18. Mich. 31 & 32 Eliz. B. R. *Hedd v. Chaloner*. — Lec. 146. pl. 204. S. C. but S. P. does not appear. 4 Rep. 27. *Clifton v. Molineux*. — Said by two justices to have been adjudged a forfeiture to bind the wife. Cro. E. in case of *Hedd v. Chaloner*.

[107] 13. *Feme covert* is heir to a copyholder, and there are three proclamations made, and she and her husband do not come in, the lord shall seize, and it is a forfeiture during the coverture; per Holt Ch. J. Show. 88. 1 W. & M. obiter.

(Z. 3) Forfeited what. By Crimes of either.

Br. Affie, pl. 114. cites S. C. — Br. Reseifer, pl. 16. cites S. C. but S. P. as to the wife's having the land by surviving the baron, does not appear.

1. A Man *infeoffed baron and feme in fee*, the baron was found guilty of felony, and it was agreed that the feme, by surviving of the baron, should have the entirety, notwithstanding the attainder; for upon purchase during the coverture, there are no moieties between the baron and feme, and therefore she shall have all by the survivor. Br. Forfeiture de Terris, pl. 28. cites 4 Aff. 4.

2. A. covenants with B. by deed, in consideration of the marriage of the daughter of A. with the son of B. and 100 l. paid, to stand seized to the use of the said daughter for her life, and afterwards to the heirs of her body by her husband begotten. This conveyance was made 31 H. 8. afterwards the husband commits murder, is attainted and executed. The wife has an estate tail by this conveyance, and the use is well raised without inrollment, for it is not raised for the consideration of money only, as the statute of 27 H. 8. of inrollment speaks. This estate is not forfeited, but preserved

in the case of murder and felony, by the statute of Westm. 2. and for treason also in this case; for the statute of 26 H. 8. cap. 13. which gives a forfeiture of estates tail to the king for treason, is where he who commits it has an estate of inheritance, but in this case the husband has no estate of inheritance, the wife alone has; by all the judges of England. Jenk. 203. pl. 27.

3. If the wife be attainted of felony, the lord by escheat shall enter and put out the husband; otherwise it is, if the felony be committed after issue had. Co. Litt. 351. a.

4. A wife kills her husband, the husband's goods are forfeited. Jenk. 65. pl. 22.

5. A husband and wife are jointenants for a term of years; the husband is *felo de se*, or suppose the wife be, the said term is forfeited. Jenk. 65. pl. 22.

6. The husband has a term for years, so has the wife; the forfeiture of the husband forfeits his own and his wife's term. The same law as to the forfeiture of the wife concerning her term. Jenk. 65. pl. 22.

7. Tenant in tail general makes a feoffment to the use of himself and his wife and the heirs of their two bodies, he has issue by the said wife. After the 27 H. 8. of uses in the 28 H. 8. the husband commits treason 29 H. 8. he is attainted and executed. The wife survives him; she is tenant in tail; for she was neither the offender nor heir to him. The wife dies. The rights of the first tail and the second tail are forfeited for this treason, by the statute of 26 H. 8. cap. 13. by all the judges of England. Jenk. 268. pl. 21.

Hob. 334. to 348. 13 Jac. Sheffield v. Ratcliffe, Jo. 69. to 82. pl. 6. Pasch. 1 Car. in the exchequer-chamber. Palm. 357. to 358. Hill.

20 Jac. Ld. Sheffield's case, S. C. argued in the exchequer. Godb. 300. to 326. pl. 417. S. C. in cam. scacc. Hct. 150. S. C. argued.

8. If the husband and wife have an estate tail, and the husband is, [108] attainted of treason, the land is forfeited. [But it seems here, that if the wife has an estate tail, and the husband is attainted of treason, the land is not forfeited.] Jenk. 203. pl. 27.

(A. a) What Things a Feme shall have after the Death of her Baron. What Actions.

[1. A Feme shall have trespass after the death of her baron, for trees cut upon her land during the coverture. 18 Ed. 4. 15. 39 H. 6. 45.]

Br. Tres. pass. pl. 340 & 341. cites S. C. but S. P.

does not appear in either. Palm. 313. Mich. 20 Jac. B. R. in case of Peters v. Rose, S. C. cited per cur. & 7 E. 4.

[2. The feme shall have ravishment of ward by survivorship, where the ward was joint to baron and feme. 43 Ed. 3. 10.] S. C. Fitzh. Briefs, pl. 561. cites S. C. & S. P. by Finch. See Br. Chattels, 14 H. 4. 24.

Br. Baron and Feme, pl. 14. cites S. C. pl. 3. cites

[3. So

and not the executor of the baron. Br. Baron and Feme, pl. 24. cites 48 E. 3. 12.

5. *Chattels personal, which vest in the baron and feme, shall not survive to the feme.* Br. Chattels, pl. 3. cites 14 H. 4. 24.

And she may bring an action after the death of the baron

6. *Trespass is done to the inheritance of the wife; though the damages recovered in an action are not real, yet the wife shall have them if the husband dies before execution; per 2 justices.* Owen 83. Pasch. 4 & 5 P. & M. in C. B. Anon.

for trespass done during the coverture, and damages shall go with the action. 2 Roll. Rep. 265. Mich. 20 Jac. B. R. Peters v. Rose Edmonds.——Palm. 313. Peters v. Rose, S. C. in error, and judgment affirmed.

D. 331. a. pl. 21. S. C. Anon. adjudged.— And. 22. pl. 45. S. C. adjudged.— Bendl. 219. pl. 252. S. C. adjudged, and the pleadings.

7. A. by will gives *all the residue* of his goods to M. his wife, whom he makes his sole *executrix*, to pay his debts, &c. M. after takes C. for her husband, who makes executors and dies. The wife shall have the goods; for she took them as executrix, and not as devisee. Mo. 98. pl. 242. Mich. 15 & 16 Eliz. Hunks v. Alborough.

But if he dies without any dis. agreement to his wife's right in it, the right to the bond is in them both, and in case of his death shall survive to the wife; per Ld. C. King. 2 Wms.'s Rep. 497. Mich. 1728. in case of Copping v. ———

8. A bond was conditioned *to pay 100 l. to baron and feme.* Payment to the husband alone is a good plea, without naming the wife. Goldsb. 73. pl. 16. Mich. 29 & 30 Eliz. May v. Johnson.

And the baron may either sue the bond in his own name, or join his wife with him; said per cur. to be the better opinion. Sty. 9. Pasch. 23 Car. Helmer's case.

9. If the baron makes a *letter of attorney to receive a bond debt* of the wife's; if J. S. receives it, the husband alone shall have an account; per Popham Ch. J. to which Fenner J. agreed. Goldsb. 160. in pl. 91. Hill. 43 Eliz. in case of Huntley v. Griffith.

10. A personal duty being a *chose en action*, as a bond to baron and feme, may well *lie in jointure between a baron and his feme*, but otherwise of other personal things; adjudged. Noy 149. Norton v. Glover.

11. If an *estray* comes into the manor of the wife, and the baron dies before *seizure*, the wife shall have it; for seizure gives the property. Co. Litt. 351. b.

Cro. C. 345. in case of Ld. Hastings v. Douglass.

12. Personal goods of which the feme has *property*, are given to the husband by the marriage; but not such, of which she has a *bare possession*, as goods bailed to her, or found by her, or which she has as executrix; but the action of detinue must be brought against them both. Co. Litt. 351. b.

But otherwise it is a chose en

13. *Legacy* of 10 l. was left to a feme covert, payable 18 months after the death of the testator. Testator dies. The husband

Baron and Feme.

* III

band may *release* it before the time of payment. Per Montague Ch. J. 2 Roll. Rep. 134. Mich. 17 Jac. B. R. Anon. action not veited in the husband, and shall survive. Arg. Gibb, 206. cites Mo. 452. pl. 618. Goldsb. 159. pl. 91.

* 14. By the civil law, an acquittance by the husband for a *legacy* to the wife is not sufficient without the wife's joining, but it is otherwise by our law; and a prohibition was granted. Hutt. 22. Mich. 16 Jac. Conisby's case. Hob. 247. pl. 314. Mich. 16 Jac. Watts v. Conisby, S. C. &

S. P. seems to be admitted.——Hut. 132. S. C. Hill. 4 Car. C. B. but seems only taken from Hob.

15. The benefit of a decree for baron and feme belongs to the feme, and not to the executors of the baron; certified by Hyde J. and confirmed by the court. Chan. Cases 27. Mich. 15 Car. 2. Nanney v. Martin. Chan. Rep. 233. S. C. decreed accordingly — 2 Freem. Rep. 172.

pl. 223. S. C. held accordingly.

16. The portion of an orphan in the chamber of London, if the husband die without altering the property, shall go to the feme; decreed by Ld. K. Bridgman, assisted by Turfden and Wilde J. Chan. Cases 181. Trin. 22 Car. 2. Pheasant v. Pheasant. 2 Vent. 343. S. C. decreed accordingly, for it is a chose en

action, and not barely a depositum.——3 Ch. Rep. 69. Pheasant v. Pheasant is not the S. P. A. on his son's marriage with B. in consideration of 1200 l. paid, and of 1200 l. more due to B. by the chamber of London, settles a jointure on her of 240 l. per ann. The son dies. The father by bill claims the 1200 l. in the chamber of London, as a purchaser, by making the settlement; but the son having done nothing to alter the property, the bill was dismissed. Ch. Prec. 209. pl. 171. Mich. 1702. Rudyard v. Neirin.——S. C. cited 2 Vern. 503.——2 Freem. Rep. 262. pl. 331. S. C. decreed accordingly. But the reporter says that most of the bar differed from the lord keeper in opinion.

17. A bond to the wife *dum sola* was by marriage articles to be paid to the baron after 12 months, and he to purchase land with it and settle it on himself and wife, and the heirs of their two bodies; remainder to the heirs of the baron. They had issue a daughter. The husband dies, and the daughter dies. The bond *unaltered* being a chose en action survived to the wife, and was not liable at law to bond creditors, nor was the interest due thereon. Cited 2 Vern. 55. as the case of Lawrence v. Beverley. 2 Keb. 841. pl. 78. Mich. 23 Car. 2. Lawrence v. Beverleigh. S. C. adjudged.——S. C. cited Nelf. Ch. Rep. 165, 166.——2 Vern. 58.

cited per master of the rolls, and says the like judgment has since been given in the case of Whitwick v. Jermin.

18. A and B. an only daughter and child, married to C. A. in 1656, made a nuncupative will, and bequeathed all his estate to B. and C. The court was of opinion that since B. and C. had took out administration with the will annexed, as universal legatees; that the same was a sufficient assent to the bequest, and thereby the whole estate of A. vested in C. except debts unreceived and choses en action, and was subject to the will of A. That the debts of A. unpaid at the death of C. shall be in the first place paid out of the choses en action which did survive to B. as administratrix to A. That as to merchandize brought to England after the death of A. and

A. and C. in a ship of which A. had an eighth part, and which B. claimed as surviving administratrix, since the same remained in specie without alteration, they were in the same condition with the other goods of A. which did vest in C. by his bequest, and do not belong to B. but are to be disposed according to A's. will, to purchase lands for the benefit of D. Fin. Rep. 370. Trin. 30 Car. 2. Gundry v. Brown.

19. *Money in trustees hands for the benefit of a feme-covert was decreed to the wife, and not to the executors of the baron, he having made no particular disposition of it. Vern. 161. pl. 150. Pasch. 1683. Twisden v. Wife.*

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20. *In debt on a bond made to a feme covert during coverture, and by her husband's consent, the defendant pleads, that the husband made him his executor. It was held no good plea; and it was said that perhaps the reason why he made him his executor, was his giving that bond. 2 Show. 247. pl. 249. Mich. 34 Car. 2. B. R. Checkley v. Checkley.*

If baron alone brings debt on a bond of the wife's and recovers judgment, this alters the nature of the security and makes it the baron's, for by this the debt is turned into rem adjudicatum, and is no longer a chose en action; Arg. said it had been so adjudged lately in B. R. Yet Ld. Cowper seemed to think that such a judgment would not carry it to the husband's representatives against the wife surviving. Ch. Prec. 415. Trin. 1 Geo. in Canc. in case of Packer v. Windham.——O. Equ. Rep. 100. S. P. in S. C. in totidem verbis.

21. *If there be a bond debt due to the wife, the husband may sue alone without joining his wife, but if the wife be joined in the action, and judgment is recovered, the judgment will survive to the wife, but not being joined, the interest does vest by the judgment in the husband, and will go to his executors; per Ld. Ch. Jefferies. Vern. 396. pl. 366. Pasch. 1686. in case of Oglander v. Baston.*

22. *Wife's portion, consisting of choses en action unaltered, and lands of inheritance shall survive to her, notwithstanding before the marriage the baron made a jointure adequate to her portion, and Ld. Jefferies dismissed the bill which was brought by the creditors of the baron to make them assets. 2 Vern. 68. pl. 63. Trin. 1688. Lister v. Lister & al'.*

23. *A. by will gives B. his daughter 400 l. and devised lands to her till his son C. should pay her this 400 l.—B. marries D. D's father covenants to settle lands of 100 l. per ann. and C. the brother covenants to pay the 400 l. to D. and on payment the lands devised to the daughter were to be discharged of this 400 l.—D. dies.—Decreed that the 400 l. should go to B. The lords commissioners thought it still continued a charge on the land, and as a chose en action survived to the wife, though it was agreed that the husband during the coverture might have released or discharged it. 2 Vern. 190. pl. 173. Mich. 1690. Bowman v. Corie.*

24. *By a settlement made on the marriage, the baron and feme were made jointenants for their lives. The baron dies, leaving the land sown with corn. The question was, whether the emblements on the land settled should go to the wife, or to the executors*

tors of the husband, because in the case of strangers they would survive; but in the case of husband and wife, Ld. Roll was of opinion they should go to the executors of the husband. The court proposed to each to take a moiety, which was agreed to: 2 Vern. 322. pl. 311. Mich. 1694. Rowney's case.

25. A jointure was made in consideration of 100 l. portion, whereas the wife had 150 l. more in her brother's hands. The baron died. Deceased at the rolls, and confirmed on appeal, that the 150 l. should survive to the wife. 2 Vern. 502. Arg. cites it as the case of Cleeland v. Cleeland.

Decreed by the master of the rolls; and on appeal to the Ld. Chancellor Somers.

mers, he was of opinion, that unless there was an agreement that the husband should have the other 150 l. it will survive to the wife; but if the settlement had been in consideration of the whole portion, and had been equivalent to it, that would have amounted to an agreement that the husband should have it. Chan. Prec. 63. pl. 58. Mich. 1696. Cleeland v. Cleeland.

26. Husband alone might bring debt for portion promised to him with his wife, and though land had been settled by husband upon wife in consideration of her fortune, of which this debt was part, yet he having not recovered it during coverture, the wife should recover it to her own use. And though it was pretended that there was a recovery in husband's time, and that they would prove by the sheriff who had writ of execution, yet they having not the judgment on which the execution was, it was ruled they could not give that in evidence; per Holt. 12 Mod. 346. Mich. 11 & 12 W. 3. Anon. [113]

27. If the husband assigns a bond of the wife's for a valuable consideration, this will not bind the wife if she survives; for she claims paramount; per Ld. Keeper Wright. Ch. Prec. 121. Trin. 1700. in case of Burnet and Kinnaston.

Ld. Keeper Wright said, that perhaps an agreement to assign might be

otherwise; but he thought it would not. Ibid.——8. C. cited 2 Vern. 502.

28. A man marries a woman intitled to a mortgage in fee, and after marriage assigns his interest in the mortgage to trustees, to call in the money, and lay it out in land, to be settled upon the husband and wife, and their issue, remainder to the heirs of the husband. The husband dies without issue, and after the wife dies. This mortgage is as a chose en action, and the wife surviving, it shall go to her executor, and not to the executor of her husband. 2 Vern. 401. pl. 371. Mich. 1700. Burnett v. Kinnaston.

The wife was not party to the articles. Chan. Prec. 118. S. C. —Nor was there any consideration; per Ld. K. Wright.

Chan. Prec. 121. S. C.——S. C. cited Arg. Ch. Prec. 416. and says the reason was, that the husband could transfer only the same rights that himself had.——Cowper C. said, that being a mortgage in fee, the husband could not dispose of it without the wife, and the estate in her gave her a right to the money. Ibid. 418.——But where there were articles before marriage, by which the husband was to discharge his estate within 6 months, (within which time she died) and for every 100 l. to settle 10 l. per ann. though the estate was but 70 l. per ann. and the fortune secured on land was 1250 l. yet Ld. Harcourt decreed the 1250 l. (the husband and wife being dead) to the administrator of the husband, he being a purchaser by the agreement, and having made some progress in discharging the estate. Ch. Prec. 312. Meredith v. Wynn.——Abr. Equ. Cases, 70. S. C.

29. A mortgage for 1300 l. taken in a trustee's name, was decreed to the executors of the baron; per Wright K. who said, that in all cases where the baron makes an equivalent settlement, it shall be intended

2 Freem. Rep. 282. pl. 353. Pasch. 1705.

Norbone's case, S. P. and seems to be S. C. and the court held accordingly; and it was said that

this case was the stronger, because it might be a question whether this was a *chose en action*; for being once money in the guardian's hands, the master of the rolls was of opinion, that it was not in the power of the grandmother, who was the guardian, to turn it into a *chose en action*, no more than a guardian or trustee can turn money into land, so as to make it go to the heir instead of the executor.——See Ch. Prec. 414. Arg. S. P.

A settlement made by the baron, pursuant to an agreement before marriage, intitles him to the wife's fortune, though standing out upon *bonds and other securities*; for hereby he becomes a purchaser, especially if such settlement was made in consideration of that fortune. Arg. said that it had been several times settled in chancery. Gilb. Equ. Rep. 100. Trin. 1 Geo. in case of Parker v. Windham.——Cham. Prec. 414. Arg. S. P.

30. If husband lends money in his and his wife's name on mortgages and bonds, and dies, the wife is intitled to this by survivorship, if there are assets sufficient without this money to pay debts; for she is in the nature of a *joint-purchaser*; per Harcourt K. 2 Vern. Rep. 683. pl. 608. Trin. 1712. Christ's Hospital v. Budgin & Ux'.

C. Equ. R. 103. S. C. & S. P. in totidem verbis.

31. An assignment by the baron of *choses en action* of the feme's is not sufficient to prevent its surviving to the feme, in case she survives the baron; for they are not assignable by law; per Ld. C. Cowper. Ch. Prec. 419. Mich. 1715. Packer v. Windham.

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32. Bond debtor to the feme becomes bankrupt. The husband pays contribution money, and dies before the distribution. Feme survives; but dies before distribution. Per Cowper C. notwithstanding the baron's paying the contribution-money, the property was not altered, but the debt remains a *chose en action*, and survived to the wife; but directed the feme's executors to repay the baron's executors the contribution-money. 2 Vern. Rep. 707. pl. 629. Mich. 1715. Anon.

33. The baron may release a *chose en action* belonging to the wife. Arg. Ch. Prec. 414. Mich. 1715.

34. If trustees pay the wife's fortune to the baron, she can have no remedy. Arg. Ch. Prec. 414. Mich. 1715.

35. Feme before marriage saved 350 l. out of her maintenance-money, which was in her brother's hands. The brother gave a bond for it to the baron; but the steward proving that the baron said his wife should have the 350 l. and that it should be placed out for her benefit; and having also, a little before his death, said he gave it to his wife, and 3 persons present wrote it down, and attested it as witnesses, though not by baron's direction, or with his knowledge; and though the baron after made two codicils, and in one of them devised several things to the wife, but took no notice of the 350 l. or the bond for it, yet Cowper C. decreed it to the wife, not as a gift from the baron, but as declared and intended originally for her separate use. 2 Vern. Rep. 748. pl. 654. Hill.

Hill. 1716. The Earl of Shaftsbury v. Countess of Shaftsbury.

36. A settlement was made by the husband in consideration of a security which the wife had for 3000 l. and it was held that it should go to the husband's executors, the wife having survived him, though it was objected that no assignment was made of it to him. L. P. Conv. 395. cites it as decreed by Ld. Cowper, 1716. Stanhope v. Thacker.

It was answered, that there was an actual agreement previous to the marriage, that the husband

should have the portion; per Reynolds Ch. B. Ibid. 396.——Chan. Prec. 435. pl. 284. Trin. 1716. S. C. but S. P. does not appear.

37. Husband and wife, having issue one daughter, join in a conveyance of the wife's lands, and agree that 600 l. part of the purchase-money, should be settled in manner following, viz. 30 l. a year, the interest thereof to be paid the husband during his life, and after his death to his wife for life, and after their deaths the interest to be paid to such daughter or daughters as shall be begotten between them, till they shall attain their respective ages of 21, or be married, and then the principal sum to such daughter or daughters; but in case there shall be no daughter, then to the survivor of the husband or wife. A. married the daughter, and in consideration of this 600 l. made a settlement on her. The daughter died in the life-time of her father and mother, and soon after the mother died without issue. The husband of the daughter is intitled to it, as her administrator. Chan. Prec. 489. pl. 304. Pasch. 1718. Hewitt v. Ireland.

38. The baron, on marriage of a citizen of London's daughter, made a considerable settlement on her, and surrendered copyholds, and gave her by his will. Her father died, whereby she became intitled, by the custom of the city, to part of his personal estate, for payment whereof several specific securities of stocks were transferred to him and her jointly. He afterwards increased her jointure considerably, but never altered his will. Per Ld. Chancellor; the stocks undoubtedly belonged to the husband; but a husband may purchase to himself and his wife, and here he takes to himself and his wife, which is the same thing. There is a considerable accession of fortune to the husband; and as this came by her, it would be very hard by equity to take from her what the law gives her; and so ordered so much of the bill as sought to make the stocks in their joint names the estate of the husband, to be dismissed. Select Cases in Chan. in Ld. King's time, 48, 49. 11 Geo. 1. Lannoy v. Lannoy.

39. A. tenant for life, with power to make a jointure of 100 l. a year for every 1000 l. on his marriage with M. with whom he received 8000 l. made a jointure of 800 l. a year, and covenanted to make a further additional jointure of 100 l. a year, for every 1000 l. which he should receive, or be intitled to by virtue of M.'s father's or mother's will. A. died without issue, at which time M. was intitled to one half of a moiety of the surplus of her father's personal estate. Upon a bill by the creditors of A. to sub-

ject M.'s share of the moiety to the payment of debts, and upon a bill by M. that in such case she may have a further jointure in proportion to such share to be made by the next in remainder, Ld. Chancellor King thought, that this could not be looked upon as bringing any further portion to A. and that it was not reasonable that A.'s creditors should have any benefit of the residue of M.'s fortune if ever that should be recovered, in regard she *cannot have any recompence in consideration thereof, pursuant to the articles for parting with it*; and therefore decreed that she keep overplus of her estate to herself, without having any additional jointure, the remainder-man not being bound or affected by A.'s covenant any further than warranted by the original power. 2 Wms.'s Rep. (648.) pl. 205. Mich. 1731. Holt v. Holt. — And Gibson v. Holt.

40. A. upon his marriage with M. gave a *bond to trustees, reciting, that by the marriage he should be greatly advanced in riches to the value of about 500 l. agreed to pay M. 10 l. a year to her separate use, and that she might dispose of 100 l. by will in his life-time, and if she survives him, he is to leave her 200 l. and all her wearing apparel, plate, &c.* Part of her fortune consisted of a bond entered into with her by J. S. before her marriage with A. They intermarried. A. died, the bond from J. S. being unpaid; but A. before his death made a will, and B. his residuary legatee. Then M. dies. Ld. C. Talbot decreed this bond to the representative of A. and not of M. and said, that most of the cases where choses en action have been decreed to the husband's representative, (he dying in the life-time of the wife,) have gone upon the reason of *equality*, there being a settlement made by the husband on his wife, whereby *he became a purchaser of her fortune*; and therefore on the one hand, as she was to have the provision made by the settlement, so on the other hand he should have her whole portion; that in the principal case the wife was tied up by the agreement, and so barred herself of the chance of survivorship, which she would otherwise have had by law, and that the husband's departure from the absolute right which by law he had over the whole is of itself a sufficient consideration. Cases in Equ. in Ld. Talbot's time 168. Hill. 1735. Adams v. Cole.

In this case the testator gave another legacy of 50 l. to the husband, and made him one of the executors, so that taking all the circumstances together, it must be intended that the testator plainly intended this as a legacy to the *separate use* of his daughter, though he did not use the very words, and it was decreed accordingly. 10 Mod. 518. 531. S. C.

41. Legacy of 200 l. left to a feme covert by her father, *to buy something to remember him withal*, was ordered to be paid, after the husband's death, out of his personal estate, (though he had laid it out in a piece of plate, and had bequeathed all his plate to her, but without interest. 9 Mod. 68. 70. 79. Mich. 10 Geo. Acherley v. Vernon.

42. On a bill by baron and feme to redeem a mortgage of the wife's estate, the defendant put in a plea, which was over-ruled, for which 5 l. costs is given to the plaintiff of course. The baron died. Ld. C. King for some time doubted; but afterwards taking it to be as a joint

joint judgment for a sum certain, determined that it did survive to the wife. 2 Wms.'s Rep. 496. pl. 158. Mich. 1728. Coppin v.

* 43. When the baron gets possession of the wife's portion, chancery will not take it from him, but a *security* for it survives to the wife; per attorney general, who said it was so laid down per Cowper C. in the case of PARKER v. WINDHAM. The master of the rolls said, that in the case of PARKER v. WINDHAM, the payment which was to a master in chancery was, as to a *special committee, the wife being lunatic*, and so vested it in the husband. Gibb. 148, 149. Mich. 4 Geo. 2. in case of Nightingale v. Lockman.

44. Bill for a legacy of 60 l. devised to her by will of Jos. Mills, 1715. when she should attain the age of 21; she attained that age 14 Feb. 1734. but before had married one Brotherow, who was dead, and the bill was against the defendant as executor of the testator, who denied assets; but it was objected, the executor or administrator of the husband ought to have been a party, for the right vested in the husband, who might release it; sed non allocatur; for the husband dying before the legacy was payable, it was in the nature of a *chose en action*, which would survive to the wife, and although the husband might possibly have released it, yet that shall not be presumed; and if it had been so, the defendant, to whom the release must be given, might make it appear. Comyns's Rep. 725. pl. 280. Pasch. 13 Geo. 2. Brotherow v. Hood in scacc.

(C. a) [What] Things *real* [shall survive to the Wife.]

[1.] If a lease for years be made to baron and feme, the feme shall have it by survivorship. 43 Ed. 3. 10]. Br. Baron and Feme, pl. 14. cites S. C. — Fitzh. Brief, pl. 561., cites S. C. & S. P. by Finch.

[2. The same law of a ward. 43 Ed. 3. 10.] Br. Baron and Feme, pl. 14. cites S. C. for this is a chattel real. — Fitzh. Brief, pl. 561. cites S. C. — Br. Chatels, pl. 3. cites 14 H. 4. 24. S. P. but that contrary it is of chattels personal vested in both.

3. If a villein and his feme purchase jointly, and the lord enters, and the villein dies, the feme or his heir collateral shall re-have the whole land; for there are no moieties between them. Br. Parliament, pl. 43. cites 40 Ass. 7.

4. Term of the wife was extended on a statute of the husband who died, the wife shall have the residue of the term, and avoid the extent as to her term. Arg. 3 Le. 156. cites it as held by Goddard and Strange. 7 H. 6. 2.

5. Tenant in dower made a lease for years, reserving rent, and took baron. The rent was arrear. The baron dies. It was agreed per

per tot. cur. that his executors shall have the rent. Mo. 7. pl. 25. Mich. 3 E. 6. Anon.

2 Lev. 100. 6. Baron possessed of a *term* in right of his wife, *grants parcel of it to another*, yet after the decease of the baron the feme shall have the residue of the term that was not granted, and it shall be only an alteration of what was granted; per Manwood J. Cro. E. 33. pl. 16. Trin. 26 Eliz. B. R. in Sym's case.

Arg. cites Co. Litt. 46. b. S. C. — 2 Vern. 63. at the end of pl. 55. cites Co. Litt. 46. b. S. P.

Cro. E. 287. 7. Baron seised of a term in right of his wife, makes a *lease for years, to begin after his death*; he died, and the wife survived him, ‡ the lease is good for the term, and after the lease is ended the wife shall have the residue. Poph. 4. Mich. 34 & 35 Eliz. B. R. Anon.

baron and feme were *jointenants of a term*, during coverture, for 60 years. The baron grants a lease, to commence after his death, for 70 years, and dies. This shall exclude the wife; for here a good term was vested in interest, though not in possession, and is not like a man's granting his term to commence after his death. — Poph. 97. S. P. cited to be so adjudged, and also decreed good in chancery. — S. C. cited Mo. 395. pl. 514. in a nota there, as adjudged that the lease was good. — S. C. cited by Gawdy J. as adjudged accordingly. 1 Rep. 155. a.

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Leffor in- seised the baron, who died seised, the wife surviving; per 8. Baron and feme were *jointenants of a term*, and the baron took a new lease, this is a surrender of the estate of the feme but only during coverture. Mo. 636, 637. pl. 876. Trin. 43 Eliz. C. B. Mellow v. May.

tot. cur. the acceptance of the feoffment by the baron was a surrender of the term, and it is extinguished; but if the conveyance had been by *bargain and sale inrolled, or by fine*, it had been otherwise. Cro. E. 912. pl. 24. Mich. 44 & 45 Eliz. B. R. Downing v. Seymour.

Pl. C. 418. 9. Baron seised of a *term* in right of his wife grants a *rent-charge* and dies, she shall avoid the charge, though if he survived it should be good during the term. Co. Litt. 184. b.

b. — 9 H. 6. 52.

Godb. 279. 10. The husband possessed of a *term for 20 years in the right of his wife made a lease of 10 years rendering rent to him, his executors and assigns, and died*. Per Crooke J. his executors shall have the rent, and not the wife, for it is a special reservation, and she comes in paramount; to which Haughton J. agreed, and said that the rent is incident to him who hath the reversion, and that is the executor of the husband; and Hobart Ch. J. of C. B. being demanded his opinion by Montague Ch. J. agreed that the wife should not have it. Poph. 145. Trin. 16 Jac. B. R. Blaxton v. Heath.

was agreed by them all, that the executors of the husband should not have it; but Montague held, that the wife should have it. And if the husband in this case had granted over the reversion, his grantee should not have the rent; but Montague Ch. J. said, that in that case the wife in chancery might be relieved for the rent. — S. P. by Periam J. but the wife shall have the residue of the term; but the other justices delivered no opinion. Cro. E. 279. pl. 5. Pasch. 34 Eliz. B. R. Loftus's case. — 4 Le. 185. pl. 285. Mich. 29 Eliz. by Popham Ch. J. — For the rent is not incident to the reversion, because she was no party to the lease. Co. Litt. 46. b. — 2 Lev. 100. Arg. cites Co. Litt. 46. b. — 2 Vern. 63. in a nota at the end of pl. 55. cites Co. Litt. 46. b. S. P. — A man has a *term* in right of his wife, and leases part of it, reserving a rent; the wife surviving shall not have the rent; Arg. and admitted by the other side. Vent. 259, in Marg. cites Co. Litt. 46. b.

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11. A * *real chattel* survives to the wife in law, but not the *trust* of such a real chattel. 3 Ch. R. 37. Pasch. 21 Car. 2. in the exchequer, in case of Attorney General v. Sands. N. Ch. R. 133. cites Co. Litt. 69. — Br.

Chattels, pl. 3. cites 14 H. 4. 24.

(D. a) [What Things] Real [shall survive to the Feme.]

Fol. 350.

[1.] F a feme seised of a *rent service* takes husband, and after the husband dies, the feme shall have the *arrears* incurred during the *coverture*. 15 Ed. 4. 10.]

Co. Litt. 351. a. at the bottom, S. P.

[2. If a *feme leases for life* reserving rent, and after takes husband; after the death of the baron, the feme shall have the *arrears* incurred during the *coverture*, and not the executors of the baron, because this *issues out of the freehold*. 11 R. 2. Account 49.]

[118]

[3. [So] if baron and feme are seised of a *rent-service for their lives*, rent incurs, and after the baron dies, the feme shall have the *arrears* incurred during the *coverture*. 29 Ed. 3. 40. adjudged.]

Grant of a rent to baron and feme for their lives. The baron dies, the

rent being arrear. The wife shall have the arrears, and so shall her administrator if she dies. Cro. E. 791. pl. 34. Mich. 42 & 43 Eliz. C. B. Temple v. Temple.

A widow as administratrix to her husband, brought an action of debt for arrears of rent incurred in the life-time of her husband, which rent was granted jointly to the baron and feme; adjudged, that the arrears belonged to her in jure suo proprio, and not as administratrix to her husband; therefore the declaring as administratrix was surplusage. Mo. 887. pl. 1248. Mich. 15 Jac. 1. Dembyn v. Brown. — Hob. 208. pl. 262. Brown v. Dunnery, S. C. & S. P. per Hobart Ch. J. — Brownl. 171. Brown v. Dunzi, S. C. & S. P. adjudged.

[4. [So] if baron and feme leases for years rendering rent. If the feme after the death of the baron agrees to the lease, she shall have the arrears incurred during the *coverture*. 7 Ed. 4. 7. b.]

[5. [So] if a feme leases for years reserving a rent, and after takes baron and dies, the feme shall have the arrears incurred during the *coverture*, and not the executor of the baron.]

[6. [But] if a feme leases for life reserving rent, and takes husband; and during the *coverture*, a receiver receives the rent of the lessee, (it does not appear by whom he was made receiver, but it seems to be intended that he received it for the baron and feme,) and after the baron dies. The executors of the baron shall have the writ of account against the receiver, and not the feme, for this was a chattel and duty in the baron by the receipt. 11 R. 2. Account 49. adjudged.]

F. N. B. 121. (C) in the new notes there (e) cites S. C. that A. was lessee for the life of a feme covert rendering rent,

and B. receives the rent as receiver. The husband dies. The wife shall have account against B. and not against the executors of the husband; aliter as it seemed to Babington, &c. if the receipt had been of a personal duty.

[7. If the ward of the body and land of another be granted to baron and feme jointly, and the baron dies during the non-age, the feme shall have the ward. 2 Ed. 3. 42. per Mutt.]

[8. If a rent-charge be granted to A. a feme, and to B. for years, and they intermarry, and after arrears incur, and after the baron

S. C. cited 2 Lutw. 1156.

dies, the feme shall have the residue of the rent, and also the *arrears* in a writ of annuity, because they participate of the nature of the principal, and the executors of the baron shall not have the arrears. Mich. 22 Jac. B. R. between CAREW AND BURGOYNE, per curiam, upon a demurrer, which intratur Trin. 18 Jac. Rot. 1187. vide 12 R. 2. Breve 639.]

S. P. cited by Popham Ch. J. Cro. E. 580. to have been adjudged in 15 Eliz. for it was uncertain in whom it should vest, and was not yet in esse, and therefore the baron could either [neither] release, grant or surrender it; but says, that if he had made a feoffment, that might perhaps have destroyed the possibility.

9. Lands were demised *to the husband and wife for their lives, remainder to the survivor of them for so many years. The husband granted over the term for years, and died.* Adjudged that the wife should have the term, because there was nothing in the one or the other to grant over until there was a survivor; and if the wife had died after the grant, the husband surviving should have the term against his own grant. Cited by Popham Ch. J. Poph. 5. as a case which happened on a special verdict in the county of Somerset about 20 Eliz.

[119] (E. a) In what Cases the *Act* of the Feme during Coverture, shall charge the Baron.

S. C. cited by Hale Ch. B. Sid. 114. Pasch. 15 Car. 2. in the case of Manby v. Scott.

[1. **I** F a feme covert borrows of a man money, and with it cloaths herself better than doth belong to her estate; though this comes to the use of the baron, because his feme of necessity ought to be clothed, yet because it is beyond the degree, the baron is not chargeable with it. 11 H. 6. 30. b.]

Fitzh. Debt, pl. 168. cites S. C.

[2. So if a monk of an abbey will borrow and build the abbey, and do more things than the abbey can well bear, the abbey shall not be charged with this, though it comes to the use of the house. 11 H. 6. 30. b.]

Fitzh. Debt, pl. 168. cites Trin. 4 E. 2. S. P.

[3. But otherways, if a monk borrows and employs it for the necessary use of the house, it will charge the house, dubitatur. 11 H. 6. 30. 12 H. 6. 5.]

Fitzh. Debt, pl. 41. cites S. C. & S. P. by Newton.—

[4. If a feme buys a thing of another, this will not charge the husband, unless it comes to the use of the husband, 20 H. 6. 21. b. 22.]

If a feme buys any thing, and it is found by special verdict that it was spent in the household, &c. yet the baron shall not be charged for it; but this is good evidence for the jury to find that the baron assumed, though it is not binding evidence. Resolved by 7 judges in the exchequer-chamber. Sid. 120. Pasch. 15 Car. 2. in case of Manby v. Scott.

Fitzh. Debt, pl. 41. cites S. C. &

[5. So if it comes to the use of the husband, if the contract was not to the use of the husband. 20 H. 6. 22.]

S. P. by Newton.—Feme covert cannot make any contract to charge her Baron, without assent precedent or subsequent, express or implied; per Foster Ch. J. and Windham J. They did not deny, but that, as circumstances might be, an express or implied assent of the baron may appear to the jury, so as the contract of the feme may be the contract of the baron; as if the goods come to his use, or that he appears well contented with the use of them. Lev. 5, 6. Mich. 12 Car. 2. B. R. in case of Manby v. Scott.

[6. But

[6. But if the contract was to the use of the husband, and it came to the use of the husband, it will charge him. 20 H. 6. 22.] Fitzh. Debt, pl. 41. cites S. C. &

S. P. by Newton. But Fitzh. says, quære well of this diversity, &c. as if he commanded the wife to buy, &c.

[7. If a woman buys things for her necessary apparel, without the consent of her husband, yet her husband shall be bound to pay it. M. 13 Jac. B. Sir THOMAS GARDINER'S CASE, per curiam.]

[8. But otherwise it is, if it be not necessary; per curiam, in the said case of GARDINER. Vide D. 6. 7. El. 234. 17.]

[9. If a feme covert be a common taverner, and sells wine, and a man delivers several tuns of wine to her to sell without the assent of the baron, the baron is not chargeable for this in an account. 13 R. 2. Account 50. (It seems to be intended, that she was a common taverner, without the assent of her husband.)]

[10. If the baron takes a distress, and puts it in the pound, and the owner comes to the pound, and there finds the wife, the baron being absent, and tenders to the wife pledges, and prays a deliverance, and the feme delivers it to him, this will be a good discharge for the owner in a parco fracto brought against him. 30 Ed. 3. 23.]

S. C. cited 3 Le. 267. pl. 358.

11. In assise the baron and feme are tenants in tail. The baron goes out of the country, and the feme infeoffs J. S. Per tot. cur. this is a disseisin to the baron, and therefore a void feoffment. Br. Feoffment de Terre, pl. 23. cites 9 Aff. p. 20.]

[120] The feoffment of a feme covert is void. Br.

Feoffment de Terre, pl. 48. cites 18 E. 4. 270

12. If a woman seals a bond in her husband's presence, and he stands by and does not gainsay, it shall bind him; per the master of the rolls. 2 Freem. Rep. 215. pl. 288. cites a case in time of H. 8.

13. If a sale be in a market overt by a feme covert, (unless it be for such things as she usually trades for, or that it is by the consent of her husband,) if the buyer knows her to be a feme covert, the sale is not binding. 2 Inst. 713.

14. The wife, without her husband's assent, bought velvets and silks of W. for her apparel. W. had notice that she was a feme covert. The husband paid the taylor for the making them, and also of other garments made for the baron himself; and then the taylor requested the money for W. for the goods, but the baron refused to pay it. Upon this evidence the defendant offered to demur; but the jury was charged, and the plaintiff at their coming back was nonsuited. The jury affirmed that they would have given their verdict against the plaintiff; but Dyer said, that at the nisi prius he much doubted thereof. D. 234. b. pl. 17. Mich. 6 & 7 Eliz, at Guildhall. Wheeler v. Points.

S. C. cited by Bridgman Ch. J. Sid. 124. Paich. 15 Car. 2. in cam. scacc. in the case of Manby v. Scott; and says the doubt of Dyer is only upon the payment of the taylor,

whether this amounted to a consent; so that without such consent the book is clear, that the defendant should not be charged. — Hutt. 107. but mispaged, viz. 106. S. C. cited Arg. but by a wrong name.

Le. 122. pl.
166. Trin.
30 Eliz.
Havithorne
v. Harvey,
S. C. ad-
judged ac-
cordingly.

15. A *feme covert* was served with process as a witness, and tendered her charges, and *she appeared not*. After verdict it was moved in arrest, that she is not within the statute of 5 Eliz. cap. 9, and the tender of the charges ought to be made to her husband; for the charge lies upon him. But it was answered, that the action is not brought for the damages sustained by her non-appearance, but for the rol. given by the statute; and that a feme covert is within the statute; for she may be the sole witness; and that she is the person punishable for not coming, and therefore the tender is to be made to her; and judgment for the plaintiff. Cro. E. 130. pl. 3. Pasch. 31 Eliz. B. R. Havithbury v. Harvey.

16. In case of *detainer by the wife*, action shall be against the husband. Le. 312. pl. 433. Trin. 32 Eliz. C. B. Marth's case.

17. Baron shall never be charged for the act or default of the wife, but when he is *made party to the action, and judgment given against him and his wife*; as for debt or scandal by the wife, or for trespass done by her, &c. there action of debt upon the case, trespass, &c. shall be brought against the baron and feme, and the baron shall plead, &c. and shall be party to the judgment; but if feme covert be *indicted* of trespass, riot, or other wrong; the wife shall answer, and be party to the judgment only, and therefore the *fine* put on the wife shall not be levied on the baron; per cur. 11 Rep. 61. b. Mich. 12 Jac. in Dr. Foster's case.

31 Mod.
253. in Mrs.
Pool's case.

18. If a feme covert *commits a riot*, the husband shall not be chargeable for it. Arg. 3 Bulst. 87. Mich. 13 Jac.

19. If the wife speaks *slandorous words*, the husband shall answer for them. Arg. 3 Bulst. 87. Mich. 13 Jac.

[121]

20. A *contract* made with a feme covert is good. 27 H. 8. 26. in TATAM'S CASE; and it shall be said the contract of the husband. 30 E. 3. 9. A *sale* by feme covert is good, and he shall declare that he himself sold this; per Coke Ch. J. 3 Bulst. 90. Mich. 13 Jac.

21. If a feme covert *commits a trespass*, the baron shall be punished for it; per Twisden J. said that this is allowed by our law, Sid. 113. Pasch. 15 Car. 2. in cam. scacc. Arg.

22. The defendant's lady *bought several goods* of the plaintiff, a mercer, and defendant paid him for them; afterwards *she parts from her husband, and takes up more goods before the plaintiff had notice of her leaving her husband*. In an action against the husband, it was ruled by Ch. J. North, at Guildhall, that the husband was liable, the plaintiff having no notice of their parting, and the husband having formerly paid for what his wife had taken up, induced the plaintiff to trust her again; but if she had taken up goods of a stranger after she was parted from her husband, it seemed that he would not have been liable; ex relatione Serj. Rawlins. Freem. Rep. 248, 249. pl. 267. Hill. 1677. Hinton v. Sir John Hudson.

23. Several goods were devised to A. feme of B. for life, and after her decease to the Lord Paget; in this case, though A. was parted from B. and there had been great suits for alimony, and *feme during separation had wasted these goods*, yet lord keeper thought it reasonable that the husband should be charged for this conversion of the feme, the Lord Paget's title being paramount the feme, and not under her. Vern. 143. pl. 136. Hill. 1682. *Ld. Paget v. Read.*

24. *A. wife trades by her husband's consent*, and gives bills for money, and he receives the profit. The wife borrowed 100*l.* and died, and a bill was brought against the husband for the money. An issue was directed to try, *whether the money was borrowed for carrying on the trade*; for if it was, the husband should be decreed to pay it. 2 Freem. Rep. 215. pl. 281. Pasch. 1697. by the master of the rolls, *Bowyer v. Peake.*

25. *Feme covert purchases lands* without the consent of her husband, he may have *trover for the money*; but if she buys land, or any thing else, pursuant to an authority given by him, he cannot avoid it afterwards, though he might countermand it before; but if she buys *necessaries for herself*, house, and family, though without her husband's privity, yet he shall be bound; because by presumption of law she understands as well how to purchase them as her husband does; at Guildhall. Cumb. 450. Trin. 9 W. 3. *Garbrand v. Allen.*

Ld. Raym. Rep. 224. S. C. & S. P. accordingly, by Holt Ch. J. but he held, that if the husband, (though not privy at the time,) afterwards con-

sents to it, the property of the money is altered, and he cannot bring trover; but otherwise if he is neither privy nor consenting.

26. Wife's contract is not binding where the husband *expressly gives warning* before-hand. 1 Salk. 118. pl. 10. Pasch. 2 Ann. coram Holt Ch. J. at nisi prius at Guildhall, *Ethrington v. Parrot.*

27. If baron and feme cohabit, and *feme deals separately*, her contracts shall charge the husband; for *cohabitation* is sufficient evidence of notice; per Holt Ch. J. 6 Mod. 162. Pasch. 3 Ann. *B. R. Langford v. Tyler.*

1 Salk. 113. pl. 2. S. C. at nisi prius at Guildhall.

(E. a. 2) Baron. Chargeable; for what Debts of Feme, contracted before Marriage. [122]

1. IF a feme bound in debt takes baron, he shall be charged during the life of the feme, but not after her death, because *cessante causa cessabit effectus*, Br. Baron and Feme, pl. 27. cites 49 E. 3. 23.

2. Citation was sued in the spiritual court against a feme sole upon slander, and the libel proved for the plaintiff, upon which the court awarded 10*l.* to the party for his costs, and for the defamation, and

and after the feme took baron, and made the baron her executor, and died, and after *citation was against the baron as executor of his feme, to pay the sum to the party*, upon which prohibition was sued, and the other prayed consultation; and per the opinion of the court, because the slander is spiritual, and they cannot award a better recompence than money, and that the baron has proved the testament of the feme, and so agreed that she made him executor, that therefore consultation shall be granted; but several serjeants contra, and that the spiritual court cannot award a sum of money, and that the slander dies with the person, and all that which depends upon it likewise; but Brooke says, it seems to him *that it is a debt, and by the death of the feme the debt shall not run upon the baron*, but it seems, *by the probate of the testament, he has taken it upon him to pay it in law*. Br. Consultation, pl. 5, cites 12 H. 7. 22.

The husband made a will, and his wife executrix, and died indebted, leaving assets, which she possessed herself of, and wasted, and then married a second husband; per Coke Ch. J. though no assets came to the hands of the baron, yet he is chargeable for the waste done by his wife before the coverture. Roll. Rep. 263, 269. pl. 44. Mich. 13 Jac. B. R. in case of Lumley v. Hutton.

A. makes his wife executrix; she takes a second husband. It was decreed, that she should be answerable for so much of the former husband's personal estate as she had possessed, and that though he took it as a portion with the widow, and this is in favour of the heir, though there were no creditors concerned, but was only to have the personal estate applied in case of the real. 2 Vern. 61. pl. 53. Pasch. 1688. Batchelor v. Bean.

4. In debt against baron and feme, as administratrix to her first husband, judgment being given against them, the sheriff returned nulla bona, &c. of the intestate, whereupon another fi. fa. was brought against them, that if it be found that they devastaverunt bona & si constare poterit, tunc. fi. fa. and the sheriff returned, *that they had no goods of the intestate in their hands, but that the wife had goods to the value of 100l. which she had wasted during her widowhood, and that the husband had not wasted any of them*, & si devastaverunt according to the writ, the jury pray the discretion of the court. It was argued, that this was a devastavit in both; and the court held, that the return of what was found by the jury was good enough, and judgment for the plaintiff. Cro. C. 603. pl. 7. Hill. 16 Car. B. R. Kings v. Hilton.

During the coverture. 5. It was admitted on all sides, that if a *feme sole is indebted, and marries*, an action will lie against husband and wife, and he is liable to the payment of her debts. 3 Mod. 186. Hill. 3 Jac. 2. J. Bull. 137. B. R. in case of Obrian v. Ram. — Per Wms. cites it as adjudged in the case of Grubb v. Johnson. — Feme sole gives warrant of attorney, and then marries, you may file a bill, and enter judgment against both. Show. 91. Hill. 1 W. & M.

[123] 6. A. marries B. an *administratrix*; B. had wasted great part of the estate before the marriage. After the marriage a suit is brought

For what came to her

brought against them for a distribution, according to the act of parliament, and a decree is had for that purpose, and then *the wife dies*; per Lds. commissioners, the husband is not to be charged further than what came to his or his wife's hands after marriage. 2 Vern. 118. pl. 117. Mich. 1689. Sanderford v. Crouch.

hands before marriage with the second husband he is to satisfy so far as he has estate of hers.

Chan. Prec. 255, 256. pl. 208. Pasch. 1706. Powell v. Bell. — And ibid. 256. Mr. Vernon said, that it had been several times held, that where a man marries a woman without stipulating for any particular fortune, or making any settlement, if after the death of his wife debts of hers appear, the husband (not being a purchaser in such case) shall be answerable for the debts of the wife in equity, so far as he had any money or other personal estate of hers. — In such case he shall be liable to make it good, even at law, during the coverture, but not after, whatever fortune he had with her; but in equity he may, if he has any specific assets of her real estate after her death; so if he has any thing merely in her right, so far he shall be liable for wails before marriage; but for the fortune at large of the wife, it was never yet carried so far as to charge the husband on account thereof after her death, especially where the husband was a purchaser of the wife's fortune for a valuable consideration, by making a settlement on her; per Mr. Vernon, Arg. Chan. Prec. 432, 433. Hill. 1715.

7. Feme *dum sola* gives bond; if the husband dies, his executor is not chargeable with this debt. Arg. 10 Mod. 161. Trin. 12 Ann.

8. A freeman of London having issue 2 daughters, devises 6000l. a-piece to them, and makes his wife executrix. By an estimate it appeared that his personal estate at his death was 18,000l. to 6000l. of which the widow being intitled, A. her 2d husband, in consideration thereof, settled a jointure of 600l. per ann. Afterwards a loss of 12,000l. befell the freeman's estate; and though the wife was dead, and it was urged that the 2d husband was a purchaser of her fortune, yet it was decreed that the daughters should have a proportionable recompence out of the 6000l. for where he takes notice in the articles that the 6000l. he has with his wife, who was executrix of her former husband, was part of her first husband's personal estate, upon an account open and unliquidated, he comes in as a purchaser thereof, subject and liable to an account; that is, as so much as upon the account might be coming to her; and besides having taken collateral security that her share should amount to the 6000l. he shall be liable to a loss befalling the personal estate afterwards, as far as the wife's proportion amounts to (though she is dead), together with her 2 daughters-in-law, who were each intitled to a 3d part by the custom of London; per Cowper C. Chan. Prec. 431. Hill. 1715. Paget v. Hoskins.

9. Where a man marries a widow executrix, &c. her evidence shall not be allowed to charge her 2d husband with more than she can prove to have actually come to her hands. Agreed per cur. Abr. Equ. Cases, 227. Hill. 1719.

(E. a. 3) Baron chargeable for what Debts of the Feme contracted before Marriage, after her Death.

Br. Baron and Feme, pl. 27. cites S. C. and

1. **W**HERE the *feme dies*, the *baron shall be discharged of the debt of the feme dum sola fuit*; for *cessante causa cessabit effectus*. Br. Dette, pl. 48. cites 49 E. 3. 25.

mond said, that if *obligation be made to a feme sole, who takes baron* and after she dies, the baron shall have the action, and by consequence shall be charged of the debt of his feme after her death; but Perly said, you speak openly against the law; to which several agreed.

* It was agreed, that debts of the wife *before coverture* shall not charge the husband, *unless recovered in her lifetime*; so if a judgment be had against a feme sole, and she marries, and afterwards dies, the husband is not chargeable. 3 Mod. 186. Hill. 3 Jac. 2. B. R. in case of Obrian v. Ram.—Arg. 10 Mod. 163.

If the feme *dum sola* gives bond, and marries, and dies, the baron is not liable. Arg. 10 Mod. 161.

* [124]

Ow. 133.

Smith v.

Jones, S. C.

adjudged for

the defend-

ant.—

Yelv. 184.

S. C. ad-

judged

against the

plaintiff,

that the de-

fendant is

not chargeable with the legacy; for he is neither executor, nor privy to the will; and though he had possession of the goods, yet inasmuch as he came to them lawfully by the intermarriage with the executrix, he has by her death only a bare custody of the goods, for which he shall not be charged either in court christian or at common law, unless he had converted them to his own use after his wife's death; but the plaintiff might compel the defendant to deliver the goods to the ordinary, or to take out letters of administration, to the intent to sue him in court christian for the legacy.—Bull. 44, 45. S. C. adjudged for the defendant. Fleming Ch. J. admitted that he might be sued in the spiritual court for those goods; but said that he had a good answer to plead there in bar, viz. that he is ready to restore them to the administrator; and this will be a good plea, in regard they came to him by his wife.

A. appointed his personal estate to be sold, and limited the money to M. his sister, *for life, remainder over, and made M. executrix, who married J. S. and dies*. A bill is brought against J. S. to account for the personal estate which came to the hands of M. It is not proved in the cause, that the same came to the defendant's hands, nor is he the representative of M. Per Ld. Ch. King, here is no foundation for this bill against defendant. The prayer of the bill is to have an account of the personal estate that came to M.'s hands, who was executrix, which can be granted against none but against her executor or administrator. How far there might be a foundation for such bill against defendant, if the testator's personal estate were proved to have come to his hands, he thought not necessary to determine in the principal case, which went off upon other points. Gibb. 68. Trin. 2 & 3 Geo. 2. in Canc. Green v. Rodd.

3. It has been held, that where a man married a *woman trader*, who died, and at her death was *indebted* to several persons for *wares* which she had bought of them, and which were by her *in specie* at the time of *her death*, and came to the hands of her husband, that though a bill be brought against him, he may either pay for those goods, or let the person have them again; yet he may insist that he is neither executor nor administrator to his wife, and there-

fore

fore not liable to her debts, and that all her goods belong to him by law. Ruled upon demurrer. Abr. Equ. Cases, 60. Trin. 1700. Blackmore v. Ley. But quære.

4. Judgment was obtained against a feme sole. She marries; then the plaintiff sues a *scire facias* against husband and wife, and has a judgment quod habeat executionem against them. Then the wife dies, and the plaintiff sues a *scire facias* against the husband, and has judgment quod habeat executionem against him; and resolved to be well, upon a writ of error out of Ireland. Cited by Holt Ch. J. as the case of Obrian v. Ram. 2 Ld. Raym. Rep. 1050. Mich. 3 Ann.

5. A. married a feme sole trader, and she dies indebted. It was insisted, that though the husband in such cases be not liable at law to the debts, yet he ought to be so in equity; but Ld. C. Parker said, that this was a question with him; for the husband runs a hazard in being liable to the debts, much beyond the wife's personal estate; and that, in recompence for such hazard, he is intitled to the whole of the personal estate, though exceeding the debts, and discharged therefrom, and indeed is intitled to the same upon the very marriage. Wms.'s Rep. 466. 469. pl. 132. Trin. 1718. in case of the Earl of Thomond v. the Earl of Suffolk.

6. M. was indebted to A. her mother in 2000l. by bond, and then A. by will devised this 2000l. to J. S. Afterwards M. married, and survived her husband, and afterwards married W. R. who had with her several jewels, and a rent-charge of 1500l. a year. About 10 years after this last marriage M. died, and then A. died, without having ever put the bond in suit. Ld. C. Parker held, that if W. R. had been executor or administrator of his wife, or executor of his own wrong, he had been liable at law as far as he had assets; but he appears not to the court in any of these capacities; and that, for aught appears, A. purposely omitted recovering judgment against him; that the husband, during the coverture, is answerable for the wife's debts, though he has nothing with her; and on the other hand, if he has received a personal estate with his wife, and happens not to be sued during the coverture, he is not liable; and in the principal case the jointure enjoyed by W. R. might have determined the next moment after marriage; and as to the demand from W. R. of his said wife's debt, his lordship dismissed the bill with costs. Wms.'s Rep. 461. pl. 132. Trin. 1718. The Earl of Thomond v. Earl of Suffolk.

[125]
Wms.'s
Rep. 470.
at the bot-
tom is a
note, that
agreeable to
this resolu-
tion, and on
the authority
thereof, it
was deter-
mined in
Lincoln's-
Inn-hall,
March 8,
1735, per
Ld. Talbot,
in case of
Heard v.
Stamford.—
The case
was; M. a
feme, gave
a promissory
note for 50l.
and then

married A. the defendant, who had ready money with her, and likewise chose in action, some of which he received in her life-time, and the rest he took as administrator to her. Upon a bill for payment of this note the defendant insisted, that such part of her fortune as was not reduced into possession by him during the coverture, and which he received after her death as administrator, was not near sufficient to pay her debts, and had already paid more than that amounted to. Ld. C. Talbot decreed an account of what the husband had received since his wife's death, as administrator to her; and that he should be liable to so much only; but as to any further demand against her, he dismissed the bill; and said, that the marriage is no gift in law of the goods which she has en autre droit; and that upon this reason only are founded all the cases, where a surviving husband has been charged with the wife's debts after her death. Cases in Eqd. in Ld. Talbot's time, 173. Hill. 1735. Heard v. Stamford.

7. A woman entered into a bond, and after married, having brought her husband a very considerable fortune. The husband constantly paid the interest of the bond during the life of the wife. Now a bill is brought against the husband for the payment of the bond, and * 1 Chan. Cases, 295. was cited; and that having paid the interest, was a taking the debt upon himself. But the bill was dismissed, though without costs. Select Cases in Chan. in Ld. King's time, 19. Trin. 11 Geo. Jordon v. Foley.

* See Free-
man v.
Goodham.

(E. a. 4) Baron chargeable for what Debts, &c. of the Feme contracted during Marriage.

1. WIFE of A. receives 10*l.* to the use of A. and this comes to the profit of A. in a convenient and necessary way, though it was without A.'s order or consent after, yet A. is liable to this debt, and count shall be of a receipt by the hands of the baron. Jenk. 4. pl. 5.

If the wife tells her husband that she will buy such a thing which is necessary, and the husband tells her that he will not allow it, and forbids the tradesman to give his wife credit for it, and after-

wards the wife takes up that thing of the same † tradesman upon credit given her by him, the husband is not liable. It is sufficient for the husband to give general notice that people do not give credit to his wife. Ld. Raym. Rep. 444, 445. says it was so ruled at Exeter Lant-assises by Holt Ch. J. 10 W. 3. in case of Longworthy v. Hockmore.

† [126]

3. If the baron is beyond sea in any voyage, and during his absence the wife buys necessaries, this is good evidence for a jury to find that the baron assumpsit. Sid. 127. Pasch. 15 Car. 2. in cam. scacc. in case of Manby v. Scott.

4. But such evidence is only presumptive, and not conclusive evidence, and therefore the jury in such case finding it specially, the court cannot give judgment against the baron; for there being necessaries, and the employment, with the residue of the special circumstances, is not but matter of evidence, upon which the jury should proceed to ascertain the fact, whether the baron promised or not. Sid. 127. in case of Manby v. Scott.

5. And the baron might contradict such presumptive evidence by other proofs; as that he gave her ready money to buy, &c. Sid. 127. in case of Manby v. Scott.

6. The father devised legacies to his children, and made the mother executrix. She married again and died. The infants brought a bill

a bill against their father-in-law, to have an account of the personal estate of the father; but decreed, that not being called to account in the life-time of their mother, he was not responsible now. Fin. Rep. 95. Hill. 25 Car. 2. Gratwick v. Freeman.

7. If the wife *pawns her cloaths* for money, and afterwards *borrow money to redeem them*, the husband is not chargeable unless he were consenting, or that the first sum came to his use. 2 Show. 283. pl. 276. Hill. 34 & 35 Car. 2. B. R. Anon.

8. In case brought for *wares sold and delivered* by the plaintiff, to the wife of the defendant, non assumpsit was pleaded, and upon evidence it appeared that the goods were *silver fringes and laces* for a petticoat and side-saddle, and that they were all delivered within the compass of four months, and that they amounted to 94*l.* and that part of them were delivered to a carrier for the wife of the defendant, by the order of Mrs. Rider, upon a letter of the wife to Mr. Rider, and that the other part were delivered upon a letter of the wife to the plaintiff; and that the laces were worn and used by the wife in the view of the defendant, and that the wife at that time lived with the defendant in the same house. For the defendant insisted, that long time before the delivery of these goods, there was a difference between him and his wife, and that they for the space of two or three years had not lived together, and that the wife declared to the defendant that she would charge him with 500*l.* in one term, and would have him in a gaol in the next, and all this before the goods were delivered; and that for many years the wife had an allowance for cloaths, viz. 50*l.* per ann. and no evidence was given that she had any occasion to have these clothes so as they could appear to be necessary. And the same day another action was tried for velvet and tissues of 3*l.* per yard, to the value of 80*l.* and Treby Ch. J. directed, that if the jury found the plaintiff innocent of the design of the wife to ruin the husband, and delivered the laces, &c. as goods fit for the wife, and upon the credit of the husband without notice of the difference between them, that the husband shall be obliged to pay the plaintiff, for it is part of his promise of marriage to feed and cloath her; and though she had an allowance, this was secret, and of which the plaintiff had not notice; but if the plaintiff had notice of the differences between the husband and wife, and sold them only to enable the wife to ruin the husband, then the defendant would not be chargeable, and though the husband be chargeable heretofore, yet after such a solemn trial, and their differences made so public, he held that the husband shall not be chargeable; and likewise if the plaintiff was not privy to their differences, but delivered the goods innocently, yet if the goods were not suitable to the quality of the wife, the defendant should not be chargeable; and if part be only suitable, he should be charged for that part only. Upon this direction, the jury being of gentlemen, found generally for the plaintiff for his whole damages. Skin. 348. pl. 18. Pasch. 5 W. & M. in B. R. Morton and Withens.

9. Debt against husband for the lodging of his wife, and proof only made that he formerly cohabited with her, and owned her as

his wife, and held sufficient to charge him, but that he might discharge himself by giving *elopement in evidence*; for they that will trust a wife after she has eloped, do it at their peril. 12 Mod. 372. Pasch. 12 W. 3. Car v. King.

Though she be ever so lewd; for he took her for better for worse.

1 Salk. 119.

pl. 13. Pasch. 3 Ann. Robinson v. Greenold. — 6 Mod. 171. S. C. and S. P. by Holt Ch. J. accordingly; and the case was, that the husband discovering his wife to be a very lewd woman went from her, and she after having lived several years with an adulterer, was received into the plaintiff's house, who entertained her as the husband's wife, and afterwards brought an *indebitatus assumpsit* against the husband for lodging and dieting his wife.

The husband shall answer for necessities, according to the degree and quality

of the husband; but if a man lends a married woman money to buy necessities and she does so, he has no remedy against the husband, but equity will suffer the lender to stand in the place of the tradesmen of whom such necessities were bought; per master of the rolls. Ch. Prec. 302. pl. 312. Mich. 1718. Anon.

* In such case he must send credit with her for reasonable expenses; per Holt

Ch. J.

12 Mod. 245. in case of Todd v. Stokes. — S. P. held accordingly by Holt Ch. J. Holt's Rep. 104. pl. 13. Pasch. 5 Ann. in case of James v. Warren.

† When such separation becomes notorious, the husband is not liable unless he takes her again. 1 Salk. 119. pl. 13. Pasch. 3 Ann. by Holt Ch. J. in case of Robinson v. Greenold.

So if baron goes away from her; per Holt Ch. J. 1 Salk. 119. Robinson v. Greenold. — And leaves her not sufficient to maintain herself; per Holt Ch. J. Holt's Rep. 104. in case of James v. Warren. — But if he turns away his wife or leaves her, and before she takes up any thing the husband proposes to maintain her at home, (though yet he will not lie in bed with her) yet if after such offer or proposal made and refused, any money was disbursed for the wife, this will be at the peril of the person so disbursing, unless the jury are of opinion that such offer was deceitful and fraudulent. For a wife is to be maintained by her husband, where and how he thinks fit according to his ability. Holt's Rep. 104. pl. 13. Pasch. 5 Ann. James v. Warren.

13. If a woman be found guilty of a battery and fined, the husband shall not be liable, per cur. 11 Mod. 253. pl. 3. Mich. 8 Ann. B. R. in Mrs. Pool's case,

Ch. Prec.

302. pl. 312.

Anon. Mich.

1718. seems

to be S. C.

14. A feme, who had the foul dissemper given her by her husband twice, left him, and borrowed 30 l. of W. R. to pay doctors and apothecaries, and for necessities. It was said by the master of the rolls, that admitting the wife cannot at law borrow money, though for necessities, so as to bind the husband, yet this money being applied to the use of the wife for her cure and necessities, the plaintiff who lent this money, must in equity stand in the place of the persons who found and provided such necessities for her. And therefore as such persons would be creditors of the husband,

so

to W. R. shall stand in their place and be a creditor also; and his honour directed the trustees (to whom the husband then deceased had devised lands for payment of all his debts) to pay W. R. his money and likewise his *costs*. Wms.'s Rep. 482. Mich. 1718. *Harris v. Lee*.

15. If a married woman comes into a shop to buy goods, and the owner not being willing to trust her because she is under coverture, a third person coming by undertakes for the payment, the court thought it clear that the owner cannot come upon the husband for the payment. Barnard. Rep. in B. R. Mich. 2 Geo. 2. in case of *Garnum v. Bennet*.

How far the contract of the feme shall bind the baron. See Lev. 4. Sid. 109. to 131. Mod. 124. to 144. and in abundance of places. in 1 Keb. the case of *Manby v. Scott*.

(E. a. 5) Second Baron. Where chargeable.

1. A. Acknowledged a statute and died intestate, and upon an extent it was returned mortuus. A new extent was issued, upon which was returned, that the widow *administratrix* had sold the goods of the deceased; whereupon the extent issues of the goods of the second baron. Mo. 761. pl. 1056. Trin. 3 Jac. in chancery, *Heyward's case*.

2. A. settled lands on trustees after his death for the payment of his debts, and the trustees not at all acting, his wife after his death enters and takes the profits. Then she marries again, and her husband continued to take the profits during his life as she did before.— He dies, and she again received the profits, and after married the defendant, who also continued to take the profits till the heir of A. came of age. On a bill by a creditor of A. it was decreed by the master of the rolls, that the defendant, the last husband, shall be liable in respect of the profits received by the wife and her former husband and himself to the payment thereof, so far as the profits taken by either of them did extend. And upon appeal, the court conceived the decree just, and that the defendant must take his wife chargeable with this debt. Chan. Cases 80. Hill. 18 & 19 Car. 2. *Gilpen v. Smith*.

3. On arguing exceptions to the master's report, the question was, how far the second husband should be charged of his own estate, for a *devastavit* and *breach of trust* by the wife and her first husband. Per cur. where there is a bond there is a lien by deed, and so the second husband bound; but where there is barely a breach of trust or debt by simple contract, there, in equity, the plaintiff ought to follow the estate of the wife in the hands of the executor of the first husband. Vern. Rep. 309. pl. 303. Hill. 1684. *Norton v. Sprigg*.

(E. a. 6) Survivor charged or benefited.

[129] 1. **B**ARON marries a *feme wrongfully seised of lands*, and after the marriage *she occupies them without the baron's assent*; yet action lies against both, as well for the occupation before the *es-poufals*, as after during the feme's life; but after her death action lies not for this occupation against the baron; but if the person who has right enters into the land after marriage, and the baron re-enters in right of his feme, or if after the marriage, *he occupies the lands*, and then the feme dies, trespass lies against him; per Rede J. Kelw. 61. Pasch. 20 H. 7. pl. 1.

2. A *feme sole* makes an agreement with other person to *distribute the residue of the estate of M.* among them, and after marries the defendant; per cur. what came in between seven and eight years after marriage by the death of the said M. was not within the compass of the said agreement, but was to go to the benefit of the husband. Chan. Rep. 26. 3 Car. 1. fol. 883. Rickfers v. Herne.

Jo. 417.
pl. 5. S. C.
but S. P.
does not ap-
pear.—
S. C. cited
Arg. Lutw.
672.—

A feme co-
vert cannot
waste during
the cover-
ture, though
the wasting of
the baron shall
charge her if she
survives; ad-
judged. 2 Lev.
143. Trin. 27
Car. 2. B. R.
Horsley v. Daniel.

3. If a man marries an *executrix and wastes the goods*, it is a *devastavit* in the wife; per cur. For it was her folly to take such husband that would make a *devastavit*; and by Jones J. if a *recovery against baron and feme* be in a *devastavit*, if the baron survives the wife he shall be charged, and if the feme survives she shall be charged; but if the recovery be not against baron and feme in the life of the feme and she dies, the baron shall not be charged. Cro. C. 519. pl. 20. Mich. 14 Car. B. R. in case of Mounson v. Bourn.

S. C. cited
by Ld. C.
Talbot;
Cases in Equ.
in Ld. Tal-
bot's time,
375. Hill.
1735. in
case of
Heard v.

4. The wife when *sole bought goods for money*, and after married, and died. The goods came to the husband's hands after her death, but the debt remained unpaid; the bill was by the creditor to discover the goods. Defendant demurred, but over-ruled by the lord chancellor, who with some earnestness said he would change the law in that point. Chan. Cases 295. Mich. 28 Car. 2. Freeman v. Goodham.

Stanford, who observed that the goods never coming to the husband's hands till after the wife's death, made it a very hard case upon the creditor, and probably occasioned the saying of the Ld. Nottingham, but that even there he over-ruled a demurrer to a bill for the discovery of the goods, and it does not appear what became of the cause afterwards.

5. If husband and wife have judgment in *scire facias for a debt due to the wife*, the benefit thereof survives to the husband; for the judgment is joint, and therefore shall survive; if the husband outlives the wife, he shall have the benefit of it; and if the wife outlives the husband, she shall have the same benefit of it; per Holt Ch. J. but Rookby J. doubted. Comyns's Rep. 31, 32. Mich. 9 W. 3. B. R. Anon.

6. Baron

6. *Baron by reputation only*, as where the marriage was by a mere layman, (a sabbatarian) is not intitled to administration to the wife. 1 Salk, 119. Heydon v. Gould. 9 Ann. coram delegatis at Serjeant's Inn in Fleet-street.

7. A feme *dum sola* gave a bond, and then married. The husband became bankrupt. The bond-debt is discharged by the bankruptcy of the husband, so that if he dies she shall not be further chargeable; per Parker Ch. J. who declared the judgment of the court as to the first part, and his own opinion as to the latter part. 10 Mod. 243, &c. Trin. 13 Ann. B. R. Miles v. Williams.

Wms's Rep.
249. pl. 57.
S. C. and
ibid. 257.
S. P.

8. Bill by the heirs and residuary legatees of Sir W. Milman against Lady Milman, executrix of Sir W. M. to have an account of the testator's estate. It being proved in the cause, that Sir W. M. being very old and infirm for 7 years before his death, did not receive money himself, though he signed receipts, and executed leases, &c. but the money was usually paid to Lady Milman, his wife. Cowper C. decreed Lady M. to account for what money she received for 7 years before her husband's death, but the master should be easy in taking the account, and allow for house-keeping, &c. without vouchers. MS. Rep. Mich. 2 Geo. Buckle v. Milman,

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(E. a. 7) Where the Feme reserves the Power of her own Estate. Cases relating thereunto.

1. A. is bound to do such act as feme-covert shall direct; she may give direction without assent of the baron, and if baron dis-assents, yet the declaration and direction of the wife shall guide the case, and shall be cause to forfeit or save the bond. And. 182. pl. 217. Pasch. 30 Eliz. Arg. in case of Forfe v. Hembling.

2. M. (a feme sole) made J. S. and W. R. (trustees of 100 l. of hers) to enter into covenant and bond to leave 100 l. to pay to whom she should appoint, and for want of appointment, then to pay it to two grand-children; afterwards (being married) she made J. S. and W. R. to cancel the covenant and bond, to make void this her intention, yet decreed to be made good to the plaintiff, (the grand-children suppose). See Toth. 162. where this is imperfectly reported, cites 10 Jac. or Car, C. B. fo. 442. Atwood v. Stubbs. (quere).

3. Debt upon obligation conditioned, that if defendant marry such a widow, who was possessed of divers goods of her first husband's, and his children's, he should not meddle with them, but that she and her children might enjoy them without interruption from him. Upon performance of covenants pleaded, plaintiff assigned for breach, that the first husband was possessed of such sheep and goods, &c. and that the wife had them before marriage, and that after marriage the defendant, such a day, took the said goods into his hands, and yet detains them. After verdict it was moved, that no sufficient breach is alleged; for it is not shewed

that the husband made any disturbance; for by the marriage the goods are in the husband, and it is *not shewn that he disturbed the wife's enjoyment* of them; and of that opinion were Hyde and Jones J. but Whitlock and Crooke c contra, and that the breach is well assigned; for by alleging the taking and detaining the goods, is supposed a taking and detaining them from the wife, and issue being found for the plaintiff, the court intends it an unjust caption and detention, contrary to the agreement. And afterwards Hyde mutata opinione upon reading the books, was of the same opinion, whereupon, absente Jones, it was adjudged for the plaintiff. Cro. C. 204. pl. 9. Mich. 6 Car. B. R. Crowle v. Dawson.

4. The wife before marriage, by indenture between her and the intended husband and two trustees, assigned over all her real and personal estate to her own disposal. After marriage *she borrows money, and furnishes a house*, of which she had desired her baron to take a lease, but declared she would defray the whole charge, and would have the disposal of the goods as her own. The wife died, having disposed of 1000 l. to the baron, which was decreed to him, and that he be discharged of paying for the goods, rent, &c. of the house, or of the 400 l. borrowed, of which she had given him 200 l. presently upon the borrowing of it, and to return to the baron some *jewels given by him to the wife before marriage*, which were not to be accounted any part of her estate, whether the gift was before or after the indenture aforesaid, she having on her death-bed declared they belonged to the baron, and that the trustees be indemnified observing such directions. Fin. R. 108. Hill. 25 Car. 2. Blyffe v. Sayers, Cherry, and Partridge.

5. Fowles upon his marriage with countess of Dorset enters into articles, that countess of Dorset should have and enjoy her estate to her sole and separate use, and that she should dispose of the surplus of such estate by any writing under her hand, &c. Countess of Dorset lays up a considerable sum of money out of her separate estate, and buys land with it, and makes an appointment pursuant to the power, and disposes of the land so purchased to a stranger. After her death Fowles prefers his bill to have these lands, and Ld. Jefferies decreed, that he should have the lands as purchased with his wife's money; but this decree was afterwards reversed in dom. proc. because bought with the money raised out of the separate estate of the wife, which she had a power by the articles to dispose of. Cited MS. Rep. 1 Geo. in the case of PETTIS v. LEE, as a case in Ld. C. Jefferies's time, Fowles v. the Countess of Dorset.

6. In such case the husband being much in debt, and *to discharge his goods going to be taken in execution, she gave a note to pay the debt* out of her own separate estate, and accordingly the action was discharged. On a bill against baron and feme, the baron could not be met with to be served with a subpoena, but the wife was enforced by attachment to answer without him, he being made

Gillb. Equ.
Rep. 83.
S. C. re-
ported in to-
tidem verblis.
—Abr. of
Cases in Equ.
65. pl. 8.

made a party only for conformity. Ch. Prec. 328. pl. 249. Hill. 1711. Bell v. Hyde.

S. C. cites no book.

7. Covenant that the wife shall dispose of her personal estate, does not extend to what shall come to her after her marriage. MS. Tab. March 11. 1711. Pilkington v. Cuthbarston.

And she having power to dispose of her personal

estate, which only comprehended the personal estate she had before marriage, gets into possession of a considerable personal estate in a private manner upon the death of her father, and conceals it from the husband, and afterwards by will disposes of it to charities, yet decreed that what was so concealed from the husband shall not be made good to him so as to disappoint the charities. MS. Tab. S. C.

8. It being agreed between the parties before the marriage, that the husband should have only so much of the wife's estate, and that she should have liberty to dispose of all the estate besides, which she should be intitled to by her last will in writing, &c. it was resolved; that 5000l. which fell to her after marriage by the death of her brother, should not go to her husband or his executors, but that the wife should have the power of disposing thereof, though at the time of the articles she had not any right or interest therein, and although at that time she could not grant or release the same; for this being a covenant shall enure according to the intent of the parties, and extend to a right in futuro, where it is the apparent intent of the parties that the husband should have no more than the sum expressly mentioned, whatever happened; by Ld. C. Cowper. MS. Rep. Hill. 1 Geo. Petts [alias Potts] v. Lee.

9. The feme by such power consented to by the husband beforehand, conveyed her real estate to trustees, and assigned all her bonds and mortgages to her separate use; but after the marriage she permitted her husband constantly to receive the interest without any complaint to either debtors or trustees, and about 10 years after the marriage the husband died. Ld. C. Macclesfield decreed the executors of the husband to make good any part of the principal money due on any of the securities, with interest, from his death; but as to the interest received by him during the coverture, as it was against common right for the wife to have a separate property from him, (they being in law but as one person) so all reasonable intendments and presumptions are to be admitted against the wife in this case, and she not having in so long a time made any complaint, her consent shall be intended and be considered as a gift, and that any other construction might have put him under great hardships, 2 Wms.'s Rep. 82. pl. 18. Mich. 1722. Powell v. Hankey & Cox.

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10. The wife having reserved power over her own estate, and vested the same in trustees, consented to sell 10 l. a year, part of her land of inheritance for 200 l. which the husband having received, he therewith founded a charity for poor widows, and gave a bond for it to the wife's trustees, to be paid to them within 3 months after the decease, for the benefit of her executors. Ld. C. Macclesfield held that this should bind the wife, and was a waiving the interest of the 200l. for her life, and if she would avoid this bond she must prove some fraud in gaining her acceptance thereof; that this being her separate estate, she must *prima facie* be looked upon as a

feme sole, and that it was as if a feme sole had accepted such bond which would have bound her; besides it might well be supposed that she contributed to this charity, it being to her own sex. 2 Wms.'s Rep. 82. 85. pl. 18. Mich. 1722. Powell v. Hankey & Cox.

And where she had made her will, and gave several specific and other legacies, and made A. and B. executors, and like-wise the husband had possessed himself of some of her money.

11. A bond given by a feme-covert (having a separate estate) upon her borrowing money, was insisted to be merely void; so that after six years it amounts to no more than a loan of so much, and that a demand then of it is barred by the statute of limitations; and the master of the rolls agreed that the bond was void; but he said, that in this case (she being dead, and a bill being brought against her executors and her husband) all her *separate estate was a trust estate for payment of debts*, and a trust is not within the statute of limitations. 2 Wms.'s Rep. 144. Trin. 1723. Norton v. Turvil.

The master of the rolls said, it seemed as if the plaintiff ought to be at liberty to prosecute all, in order to be paid out of the separate estate left by her; to which purpose such part thereof as is undisposed by the will ought to be first applied, and if not sufficient, then the creditors should be paid out of the money-legacies; and if those are not sufficient, all the specific legacies ought to contribute in proportion. 2 Wms.'s Rep. 145. Norton v. Turvill.

MS. Rep.
Mich. 1734.
Halsey v.
Badham.

12. A. by will gives 2 legacies to his daughter B. of 500l. each, one of them for her sole and separate use, she being married without a settlement. Decree for placing out the money for her benefit. The husband, upon petition to Ld. C. Macclesfield, obtained an order for one 500l. and the other 500l. by consent to be laid out for the separate use of the wife. The husband and wife, she being 19, join in an assignment of the last 500l. to secure a debt to H. the plaintiff, and the husband becomes bankrupt. H. brought a bill against the assignees of bankruptcy, and husband and wife; and Ld. King decreed the assignment good, and the residue to be paid to the assignees. The wife rehears, &c. alledging that she was poor, and not able to produce the order of Ld. Macclesfield. Objected, that the assignment was good, it being of her separate estate, though under 21; and that infants may execute a power by an attorney, &c. Ld. Chancellor, as to that objection that the order was voluntary, and did not bind creditors, said that is a hard censure on the proceedings of the court, and such settlements are usual practice, and this here is according to the will. Where the husband makes a voluntary provision for the wife, to take place after his death, it has been adjudged fraudulent; but here it is set apart immediately. As to the assignment itself, he admitted that if feme had been sole it had not been good, but void; but the case is stronger, because she was a feme-covert. And though in cases of meer powers or authorities infants may execute, because nothing moves from them, yet this is an interest, and can no more be departed with in equity by an infant, than by an infant's assignment of a legal estate at law. Decree varied.

13. A woman having lands and a personal estate, before marriage conveys all her estate to her separate use, to which the husband was a party; and he covenanted that he would not interfere with it.

it. On this estate so conveyed, there was a mortgage for 300*l.* *whicb, before the conveyancers, he verbally promised to discharge.* During the coverture *the mortgage was assigned over, and he covenanted thus, that I or my wife shall pay it.* The husband and she lived with great affection together, and he constantly received all the profits of this separate estate. He died, having never paid off the mortgage, leaving children, which he had by a former venter, fortunes: these the wife maintained after his decease. The wife brings her bill; 1st, That the effects of the husband should be applied to the redemption of the mortgage. 2dly, To have account of the profits of her separate estate, received by the baron. 3dly, To have an allowance for the maintenance of his children after his decease. It was decreed, that the husband's effects should not be charged to redeem the mortgage, nor be accountable for the profits of her separate estate received by him; and that the maintenance should be counterbalanced by the interest of their fortunes. And upon a rehearing the Ld. C. said, that there is no foundation to charge him with the payment of the mortgage; *for by the statute of frauds it is no charge, unless reduced into writing: all is at an end when there is an agreement in writing; all the conversation was only as previous steps.* This is the ultimate settlement of the whole affair on mature consideration of every thing; as between him and the mortgagee he might be charged, but not by the wife. *As to the receipt of the separate maintenance, if they lived together amicably, it shall be looked on as done by her consent.* As to the maintenance, she has taken it upon herself; and it does not appear to me but the interest is sufficient for that purpose. Decree affirmed. Select Cases in Chan. in Ld. King's Time, 20, 21. Trin. 11 Geo. Christmas v. Christmas.

(E. a. 8) Pin-Money. Cases relating thereto.

1. **W**HERE the husband, during his cohabitation with the wife, makes her an allowance of so much a year for her expences, if she out of her own good housewifery saves any thing out of it, this will be the husband's estate, and he shall reap the benefit of his wife's frugality, because when he agrees to allow her a certain sum yearly, the end of the agreement is, that she may be provided with clothes and other necessaries, and whatsoever is saved out of this redounds to the husband; per Ld. K. Finch. Freem. Rep. 304. pl. 373. Trin. 1674. in Lady Tyrrell's case.

2. A term was created on the marriage of A. with B. for raising 200*l.* a year for pin-money, and in the settlement A. covenanted for payment of it. There was an *arrear of one year at A.'s death*, which was decreed, because of the covenant to be charged on a trust-estate settled for payment of debts, it being in arrear for one year only; *secus* had it been in arrear for several

Abt. Equ. Cases, 66. pl. 1. S. C. But the court allowed a year and 3 quarters where the whole

was proved
to be in ar-
rear; and

several years. Chan. Prec. 26. pl. 28. Trin. 1691. Offley v. Offley.

that between husband and wife, who lived well together, 3 quarters of a year made but little difference. Abr. Equ. Cases, 140. pl. 7. Mich. 1728. Countess of Warwick v. Edwards.

* 3. The plaintiff's relation (to whom he was heir) allowed the wife pin-money, which *being in arrear*, he gave her a note to this purpose; "*I am indebted to my wife 100 l. which became due to her such a day.*" After by his will he makes provision out of his lands for payment of all his debts, and all monies which he owed to any person in trust for his wife; and the question was, whether the 100 l. was to be paid within this trust; and my Ld. Keeper decreed not; for in point of law it was no debt, because a man cannot be indebted to his wife, and it was not money due to any in trust for her. Hill. 1701. between CORNWALL AND THE EARL OF MOUNTAGUE. But quære; for the testator looked on this as a debt, and seems to intend to provide for it by his will. Abr. Equ. Cases, 66. pl. 2.

4. Where the wife has a separate allowance made before marriage, and buys jewels with the money arising thereout, they will not be assets liable to the husband's debts. Chan. Prec. 295. pl. 232. Trin. 1710. Wilson v. Pack.

5. Where there is a provision for the wife's separate use for clothes, if the husband finds her clothes, this will bar the wife's claim; nor is it material whether the allowance be provided out of the estate which was originally the husband's, or out of what was her own estate; for in both cases her not having demanded it for several years together, shall be construed a consent from her that he should receive it; per Ld. C. Macclesfield. 2 Wms.'s Rep. 82. 84. pl. 18. Mich. 1722. Powell v. Hankey & Cox.—And to the same purpose his lordship cites (Hill. 1712.) the case of Judge Dormer and the Bishop of Salisbury.

6. So where 50 l. a year was reserved for clothes and private expenses, secured by a term for years, and 10 years after the husband died, and soon after the wife died, the executors in equity demanded 500 l. for 10 years arrear of this pin-money; but it appearing that the husband maintained her, and no proof that she ever demanded it, the claim was disallowed. 2 Wms.'s Rep. 341. pl. 98. Hill. 1725. Thomas v. Bennet.

(E, a, 9) Feme relieved against the Acts of the Baron.

1. **I**N assise, if a man seized in jure uxoris leases the land to B. for life, and after grants the reversion to J. in fee, and dies, and after B. dies, the entry of the feme is lawful; for there was no discontinuance but for the life of B. for the reversion in fee is not discontinued because the baron died before the tenant for life, so that the

the reversion was not executed in his life. Br. Discont. de Possession, pl. 15. cites 28 Aff. 6.

2. 32 H. 8. cap. 28. §. 6. *No fine, feoffment, or other act done by the husband only, of any lands, &c. being the inheritance or freehold of the wife, during the coverture between them, shall make any discontinuance thereof, or be prejudicial to the wife or her heirs, or to such as shall have right, title, or interest to the same by the death of such wife; but that the same wife or her heirs, and such other to whom such right shall lawfully appertain after her death, may enter into the same according to their rights and titles therein, any such fine, &c. to the contrary notwithstanding; fines levied by the husband and wife, whereunto she is party or privy, only excepted.*

At common law, if a man seized of lands, as in right of his wife, &c. and thereof in- feoffed another, &c. and died, the feme could not enter, but

was put to her action, which was called a *cui in vita*, &c. Litt. f. 594. — But now in all cases where the feme might have *cui in vita* at the common law, she shall enter by the purview of this statute; and where the issue could not have fur *cui in vita* or formedon, in such case he shall not enter within the remedy of this statute; and therefore if the baron has issue, and aliens, and the feme dies, the issue shall not enter during the life of the baron, because at the common law he had no remedy to recover the land during the life of the baron, and the words of the act are according to their right or title therein. Resolved 8 Rep. 72. b. 73. a. Pasch. 7 Jac. Greneley's case. — Mo. 58. pl. 164. Pasch. 6 Eliz. it was said by Dyer, upon the stat. of 32 H. 8. cap. 28. the words of which are, that "all recoveries and discontinuances, and alienations, &c. shall be utterly void and of no effect; but that the said femes, after the death of their barons, may enter;" that these last words of the statute have intendment to abridge the words precedent; for if after such alienation the baron and feme are divorced, and the baron dies, she is put to her writ of *cui in vita ante divortium*; and yet the words of the statute are, that "such alienation shall be void;" but this shall be intended to take away the writ of *cui in vita*. — [I do not observe the words of (recoveries and alienations being void and of no effect) in the statute.] — 4 Le. 104. pl. 210. in the time of Q. Eliz. C. B. says, note by Dyer upon the words of stat. 32 H. 8. cap. 28. "that a feoffment of the lands of the wife shall not be a discontinuance; but that the wife may enter after the death of her husband," that this is an abridgment of the words precedent; for in some cases such a feoffment is a discontinuance; as if, after the feoffment they are divorced, she cannot enter, but is put to her writ of *cui ante divortium*.

If the husband makes a feoffment in fee of the lands of his wife, and after they are divorced cause *pracontractus*, yet the woman may enter within the purview of that statute, and is not driven to her writ of *cui ante divortium*, as she was at the common law; albeit the entry be by statute given to the wife, and now upon the matter, she never was his lawful wife; but it sufficeth she was his wife de facto at the time of the alienation, and where her husband dieth she cannot be his wife at the time of the entry. Co. Litt. 326. a. — 8 Rep. 73. a. in Greneley's case, S. P. The feoffment was made during the coverture between them, and though the statute says (but that the same wife, &c.) this is to be intended of her who was his wife at the time of the alienation; for when the baron is dead, she is not then his wife, but is called his wife only to describe the person that shall enter; and the statute does not say that (the wife shall enter after the death of her baron), but says generally that (she shall enter according to their right and title), be it in the life of the baron after divorce a vinculo matrimonii, or after his death. — Mo. 58. pl. 164. Pasch. 6 Eliz. says that in such case she is put to her writ of *cui ante divortium*.

† Co. Litt. 326. a. S. P.

3. *Baron alone levies a fine of the land of the feme with proclamation. The baron dies, and 5 years pass. The feme is barred.* Arg. 2 Roll. Rep. 410. cites 5 E. 6. 72.

Without action or entry she is barred for ever; per

opinionem curiæ, notwithstanding the stat. of 32 H. 8. cap. 28. which does not limit any time of entry, &c. but this does not restrain the general law made by the stat. 4 H. 7. of fines with proclamations; and the stat. 32 H. 8. speaks of fines only, without proclamations. D. 72. b. pl. 3. Mich. 6 E. 6. Anon. — S. C. cited, and S. P. resolved, 8 Rep. 72. b. Pasch. 7 Jac. in Greneley's case. — Co. Litt. 326. a. S. P.

4. Where the baron and feme are joint purchasers in tail, the remainder to the feme in fee, and the baron aliens by fine without his feme, and dies. It was held clearly by the 2 chief justices, Stamford and Dyer J. to be within the statute which speaks of alienation

Mo. 28. pl. 90. Trin. 3 Eliz. Anon. S. P. held accordingly by all

the justices. — Co. pl. 48, 49. Trin. 4 & 5 P. & M. Wingfield v. Littleton, Litt. 326. a. S. P. — 8 Rep. 72. a. Grendley's case, S. P.

5. A joint estate to the baron and feme has always been taken to be within these words (*jus uxoris*), and yet it was not only or barely *jus uxoris*. 8 Rep. 72. a. per cur. and says that according to this resolution it was adjudged in BEAUMONT'S CASE, and that with this agrees D. 191. b. pl. 22. Mich. 2 & 3 Eliz. Hawtry's case.

BendL. 225. 6. Baron and feme are jointly seised in tail, remainder to the baron in fee. They have issue. The baron levies a fine with proclamations. The heirs of their bodies are barred by the statute of 32 H. 8. of fines, but not the feme; for the is not within it. And. 39. pl. 101. Mich. 15 & 16 Eliz. Anon.

a. b. resolved that by such fine, or if the baron commits high treason, and dies, and the feme before or after entry dies, the issue is barred. — Dal. in Kelw. 205. a. b. pl. 7. Bendloes seemed of opinion, that if the feme had entered the fine had been avoided; but the other justices e contra.

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Mo. 596. 7. If a man seised of copyhold land in right of his wife, surrenders it to the use of another in fee who is admitted, and the baron dies, this is no discontinuance to the feme nor her heirs, but that she may enter, and shall not be put to her cui in vita, nor the heir to his fur cui in vita. 4 Rep. 23. pl. 4. Pasch. 35. Eliz. B. R. Bullock v. Dibley.

Every was made of such estate, nor can a warranty be annexed to it, for the benefit whereof a discontinuance is admitted. And the case of FOXLEY v. COSEN, Mich. 32 & 33 Eliz. Rot. 937. was cited to have been adjudged no discontinuance. And all the justices took it that it is not within the letter nor equity of the statute of 32 H. 8. which gives entry to the feme and her heirs against the discontinuance of the baron. — But Cro. J. 105. pl. 44. Mich. 3 Jac. B. R. in case of COLLINS v. CANCKE, where the question was upon a special verdict, Walmsey J. held that it was a discontinuance, notwithstanding the case in 4 Rep. 23. a. No judgment was given here, but they pleaded de novo.

As no one will doubt but that if the wife enters first, it shall benefit those in remainder also, though the statute should be thought to be made only for the good of the wives directly; so clearly here the words give entry as well to others as to the wives and their heirs; per Hobart Ch. J. but said he was of opinion, that if a wife being seised in fee after such alienation of the husband, should die without heir, that the ld. by * escheat should not be within the remedy of this statute. Hob. 261.

* Hob. 243. Hobart Ch. J. calls the entry of ld. by escheat an irregular entry, and says the common law will not extend to irregular entries that were given by special statute, differing from the reasons of the common law.

8 Rep. 72. b. 9. Where the husband and wife are jointly seised to them and their heirs, of an estate made during coverture, and the husband makes a feoffment in fee and dies, the wife may enter by this statute. And so it is if the feoffment be made by the husband and wife, though the words of the statute are (*by the husband only*) for in substance this is the act of the husband only. Co. Litt. 326. a.

104e, the feme is barred, and cannot enter by force of this statute. — Co. Litt. 326. a. S. P.

10. If the husband causes *precipe quod reddat* upon a faint title to be brought against him and his wife, and suffers a recovery without any voucher, and execution to be had against him and his wife, yet this is holpen by the statute; for this by construction is the act of the husband, and the words of the statute be made, suffered or done. Co. Litt. 326. a.

11. The husband is tenant in tail, the remainder to the wife in tail. The husband makes a feoffment in fee. By this the husband by the common law did not only discontinue his own estate tail, but his wife's remainder; but at this day after the death of the husband without issue, the wife may enter by the said act of 32 H. 8. Co. Litt. 326. a.

12. B. and his wife being seized in special tail, remainder to B. in fee, B. alone levied a fine to Ed. 6. in fee, which estate came to the earl of H. in fee. B. having issue, died, his wife entered; the earl of H. confirmed the estate in the wife, habendum to her and the heirs of the body of her and her husband. And it was ruled that the confirmation wrought nothing, because she had as great an estate before. And also the issues could not be made inheritable which were before barred by their father's fine, and the estate tail, as against them, lawfully given to another. And it was further resolved by way of admittance, that if the remainder in fee had not been to B. himself, but to a stranger, the entry of the wife had restored that remainder to the stranger, and had left nothing in the cognisee, but a mere possibility; so she * hath the tail not only to herself, but to the benefit of other estates growing out of one root with his. And yet during the life of B. the intail had been barred, and all had been in the cognisee, and the wife had had nothing but a possibility vice versa. Hob. 257. Hobart Ch. J. cites 9 Rep. 140. [138. b. &c. Pasch. 10 Jac. in the court of wards] Beaumont's case.

2 Inst. 681. S. C. says the king is bound by this act though not named; and though the words of this act are (being the inheritance and freehold of the wife), and the lands in this case were as well the freehold and inheritance of the husband, as the wife; yet because it was a beneficial law

to suppress a wrong, and to give the party wronged a speedy remedy, and that it was in equal mischief, it was adjudged to be within this statute.

13. Twisden said he had a case from my lord Keling, where a feme covert infant levied a fine, and her friends got a writ of error in the husband's and her name. That the court would not suffer the husband to release, but Hale said he could not see how that could be avoided; but he had known that in such case the court would not permit the husband to † disavow the guardian which they admitted for the wife. Vent. 209. Pasch. 24 Car. 2. B. R. in Lady Prettyman's case.

* [137] † S. P. by Hale Ch. J. Vent. 185. Hill. 23 & 24 Car. 2. B. R. in case of Freeman v. Bodington.

14. A feme covert was a midwife, by which she got a great deal of money, and also bought and sold goods as a feme sole merchant, and put out several sums at interest in trustees names, the husband having agreed by articles, that as she got it she might dispose of it at pleasure, allowing him a maintenance, which she always did, and she had no maintenance from him for 18 years, but maintained him, herself, and four children all the time, and portioned out two daughters, and paid her husband's debts, and so discharged him out of prison. Afterwards he assigned all his real securities of land and money,

money, and all his personal estate to his daughters husbands, and made them his attornies to sue for, &c. the same, and the trustees should stand intrusted for the husbands in equal moieties, but to allow the husband and wife 20 l. per ann. On a bill by the sons-in-law against the trustees and their father and mother, it was by consent of all parties decreed that the said estate should be divided into moieties, one to the plaintiffs, and one to the mother, or to whom she should appoint, and that the plaintiffs and the mother should pay her husband 20 l. a year for his life; and that so much of the assignment as gives the plaintiffs all the estate of the father and mother be discharged, and that the mother keep and dispose of what she has by virtue of this decree or otherwise, and what she shall after acquire by her industry, either by gift, or by her will without any controul of the plaintiffs or her husband, as a feme sole may do. Fin. Rep. 56. Hill. 25. Car. 2. Ward v. Summer, and Davis and al'.

15. Feme joins in a mortgage with her baron, and levies a fine to bar dower; in consideration whereof, the baron agrees that the wife shall have the redemption. The husband mortgages the estate twice more. The court thought this agreement fraudulent as against the subsequent mortgages, so far as to intitle the wife to the whole redemption; decreed per North K. that if the wife survive the husband, she should have her dower, and that without being obliged to bring her writ of dower. Vern. 294. pl. 287. Hill. 1684. Dolin v. Coltman.

16. Bill against baron and feme as executors for a legacy. The defendants answer, and witnesses are examined, and publication passed. Baron dies. Per cur. here is no abatement, and the wife shall be bound by the answer and depositions; but in case of the wife's inheritance it might be otherwise. 2 Vern. 249. pl. 234. Mich. 1691. Shelbury v. Briggs.

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But where a bond was given by the husband for payment of a sum of money to his wife in case she survived him, and the husband af-

17. A man marriage gives bond to leave his wife worth 500 l. or a third part of his personal estate at her election. A becomes bankrupt. Decreed that the wife come in as a creditor on the 500 l. bond, and what * should be paid in respect thereof, to be put out at interest and received by the creditors during the life of the husband, and if the wife survived, then the money to be paid to her. 2 Vern. 662. pl. 587. Trin. 1710. Holland v. Calliford.

ter became a bankrupt; per Ld. Ch. there can be nothing stopped by way of dividend out of the bankrupt's estate, to answer this contingent debt or demand when it happens. Mich. 1728. Abt. Equ. Cases 54, 55. Chawell v. Cassanet.

(E. a. 10) Leases made of the Wife's Estate. Good or not.

The common opinion amongst all the justices at this day, is, that

1. 32 H. 8. **L**EASES made by him that is seized in right of the wife of inheritance, or jointly with his wife by purchase during the coverture or before, shall be good and effectual. And the wife shall have such remedy for the rent after the death of her husband

band the lessor against the lessee, his executors and assignees, as the husband lessor might have had. *Provido that all leases made of land, &c. whereof the inheritance is in the wife, shall be made by indenture in his and his wife's name, and she to seal the same; and the rent to be reserved to him and his wife and to the heirs of the wife. And the husband shall not discharge any of the rent but only during coverture, unless by fine levied by both.*

where the baron and feme made a lease before the statute 32 H. 8. by parol, reserving rent to them, and after-

wards the feme, when she is sole, receives the rent of the termor, that this shall not bind her from avoiding the lease unless it was by indenture, because her assent was requisite to the commencement of the lease, which ought to have been by deed. D. 91. b. in a note of the reporter, pl. 13. Mich. 1 Mar. in case of *Turney v. Sturges*.

There are 9 things necessarily to be observed. 1st, The lease must be made by deed indented, and not by deed poll, or by parol. 2dly, It must be made to begin from the day of the making thereof, or from the making thereof. 3dly, If there be an old lease in being, it must be surrendered or expired, or ended within a year of the making of a lease, and the surrender must be absolute, and not conditional. 4thly, There must not be a double lease in being at one time, as if a lease for years be made according to the statute, he in the reversion cannot expulse the lessee and make a lease for life or lives according to the statute, nor e converso; for the words of the statute be, to make a lease for 3 lives or 21 years, so that one or the other may be made, and not both. 5thly, It must not exceed 3 lives, or 21 years from the making of it, but it may be for a lesser term, or fewer lives. 6thly, It must be of lands, tenements and hereditaments, manurable or corporeal, which are necessary to be letten, and whereout a rent by law may be reserved, and not of things that lie in grant, as advowsons, fairs, markets, franchises, and the like, whereout a rent cannot be reserved. 7thly, It must be of lands or tenements, which have most commonly been letten to farm, or occupied by the farmers thereof by the space of 20 years next before the lease made, so as if it be letten for 11 years at one or several times within those 20 years it is sufficient. A grant by copy of court roll in fee for life or years, is a sufficient letting to farm within this statute, for he is but a tenant at will according to the custom, and so it is of a lease at will by the common law; but those lettings to farm must be made by some seised of an estate of inheritance, and not by a guardian in chivalry, tenant by curtesy, tenant in dower or the like. 8thly, That upon every such lease there be reserved yearly, during the same lease, due and payable to the lessors their heirs and successors, &c. so much yearly farm or rent, or more, as hath been most accustomedly yielded or paid for the land, &c. within 20 years next before such lease made. 9thly, Not to any lease to be made without impeachment of waste; therefore if a lease be made for life, the remainder for life, &c. this is not warranted by the statute, because it is dispensable of waste. But if a lease be made to one during three lives, this is good; for the occupant, if any happen, shall be punished for waste. Co. Litt. 44. a. b.

Ejectment of a lease of A. the husband. Upon not guilty pleaded, a lease by indenture was shewn in evidence to the jury in the name of the baron and feme, and signed and sealed by the baron and feme, and letter of attorney by the baron and feme to deliver it upon the land, and he delivered it in both their names; but because the declaration in ejectment was of a lease of A. only, and not in the wife's name, exception was taken; and per 3 J. the declaration is good; for the delivery by the attorney is a void warrant as to the wife, and so it is the lease of the baron only. But if the lease had been delivered on the land by the baron alone, it had been a good lease for both, and the declaration should have been accordingly; but now it is the lease of the baron only, and not voidable, but void against the wife. Cro. J. 617. pl. 1. Mich. 19 Jac. B. R. *Gardiner v. Norman*.—It is the lease of them both during the husband's life. Cro. C. 195. pl. 10. Mich. 5 Car. B. R. v. *Hopkins*.

The husband after marriage purchases to him and his wife and their heirs, and after without his wife, makes a lease for sixty years, at more rent than the same had been let for before, only it was leased before in two parts and now in one. Per 3 J. against *Hobart Ch. J.* the lease is good, and not within the proviso, because it is not the sole inheritance of the wife, and the appointment thereby is, that the reservation shall be to them and the heirs of the wife, which is not intended of a joint estate; but then the reservation should be to both their heirs. Cro. C. 22. pl. 15. Mich. 1 Car. C. B. *Smith v. Trinder*.

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2. The wife nor her heirs shall not have liberty by this act to avoid any lease to be made of her inheritance by her husband and her for 21 years or under, or three lives, whereupon the accustomed yearly rent for 20 years before is reserved.

The husband and wife seised in right of the wife, levied a fine

to the use of themselves for their lives, and afterwards to the use of the heirs of the wife, proviso that it shall be lawful for the husband and wife, at any time during their lives, to make leases for 21 years or 3 lives. Afterwards the wife being covert, made a lease for 21 years, and it was adjudged a good lease against the husband, though made when she was a feme covert; and though it was made by her alone, by reason of the proviso. Godb. 357. pl. 419. Pasch. 21 Jac. B. R. *Anon*.

Baron

Baron and feme joined in a lease, but *no rent was reserved* therein. The question was, if this was a lease made by baron and feme. It is not like the case of such lease by an infant, for the baron had power, and the wife joining in the lease it is not void, for she may affirm the lease by bringing a writ of waste, or accepting fealty; and adjudged accordingly. Hutt. 162. Hill. 4 Car. Anon.——It is the lease of the wife till she disagree. Cro. E. 112. pl. 9. Mich. 30 & 31 Eliz. B. R. Jackson v. Mordant.

Baron and feme seised in tail, made a lease reserving rent. The baron died. The feme entered and died. The lessee entered and did waste. The

issue in tail brought action of waste, and counted of a lease made by the baron and feme. The defendant pleaded, that the baron and feme did not demise; issue was joined thereupon, and the matter before found, and adjudged against the plaintiff, because the feme had election to agree or disagree to the lease; and *when she disagreed, it was the same thing as if it never had been the act of her who disagreed.* And. 350, 351. cites it as the case of Thetford v. Thetford.

And. 220. pl. 239. Pasch. 28 Eliz. S. C. held accordingly.——Sav. 109. pl. 185. S. C. and the court held that this shall never be taken to be the lease of the feme, and this is proved by her disagreement after her baron's death, and therefore judgment was given against the plaintiff.——Le. 192. pl. 274. Mich. 31 & 32 Eliz. C. B. the S. C. but reports it to be an action of debt; but Anderson held, that by the wife's disagreement, and her occupation of the land after the death of her husband, she had made it the lease of the husband only.——3 Rep. 27. b. 23. a. cites S. C. in action of waste resolved accordingly.

And. 220. says the plaintiff declared of a lease by the baron and feme by deed indented, but the jury found, that notwithstanding the demise, the baron continued possession and died; and the feme, after her baron's death, would not permit the lessee to enter. But that after the death he entered and did the waste, and the jury doubted; whereupon the court held that the baron and feme did not demise.——Sav. 109. pl. 185. though the plaintiff counted of a lease by baron and feme, yet he did not allege it to be by deed; and then the question was, if the verdict, finding that it was by deed indented, had supplied that imperfection. But the opinion of the court was, that this shall never be taken to be the lease of the feme, because her disagreement after her baron's death proves it; and for this point judgment was given against the plaintiff.——Le. 192. pl. 274. S. C. it seemed clear to Anderson, that the jury have found for the defendant, viz. non demiserunt; for it is now no lease ab initio, because the plaintiff has not declared upon a deed.——4 Le. 50. pl. 131. S. C. & S. P. held by Anderson J. accordingly.——But Le. 204. pl. 283. in S. C. Periam J. held, that though the plaintiff declares generally of a lease made by the husband and wife, yet the jury having found that it is by indenture, it is pursuant enough.——3 Rep. 27. b. 23. a. cites S. C. and that the jury found that it was by the deed indented; but adjudged that by the disagreement of the feme, in judgment of law, it was the lease of the baron only.

But in such case, though the declaration in an ejectment did not set forth that such lease was made by deed; yet upon a precedent of Pasch. 33. Eliz. Moseley v. Gilbert, where the plaintiff counted of such lease, and did not mention any deed, yet it was adjudged; and the like in another case of Digges v. Withers. The plaintiff in the principal case had judgment to recover. Cro. E. 481. pl. 15. Trin. 38 Eliz. B. R. Childes v. Wescot.——2 Rep. 60, 61. Hill. 41 Eliz. C. B. Wiscott's case. S. C. adjudged accordingly.

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Cro. E. 216. pl. 14. S. C. adjudged accordingly; for being made by the baron only, it was void against the

4. Husband and wife seised of land in the right of the wife, the husband alone makes a lease by word for years; afterwards the husband and wife levy a fine, and after the wife and husband both die. It was *holden clearly by the whole court, that the conusee should avoid the lease. Le. 247. pl. 332. Mich. 31 & 32 Eliz. B. R. Harvey v. Thomas.

feme, and no acceptance could make it good; and as it shall be void to the feme, so it shall to the conusee.——4 Le. 15. pl. 54. S. C. & S. P. by Wray Ch. J. but Gawdy e contra, because the conusee meddles with the land itself, and an estate in the land is conveyed by the husband, which none but the wife or her heirs shall avoid; and if the wife, after her baron's death, accepts the rent upon such lease, the lease is thereby confirmed.——S. C. cited 2 Rep. 77. b. as adjudged that the lease was determined by death of the baron, and the conusee shall avoid it; for the baron joined only for conformity

conformity and necessity. — Roll. Rep. 402. Arg. S. C. cited accordingly, because all passed from the feme. — Bridgm. 45. S. C. cited accordingly. — 3 Bulst. 273. Arg. cites S. C. — But Goldsb. 13. pl. 13. Pasch. 28 Eliz. It was said by serj. Shuttleworth, Arg. that if the husband makes a lease of the wife's land for 100 years, the wife may avoid it after his death, but if after they both levy a fine, the lease shall be good for ever, and *ibid.* 14. the same was agreed by Fenner of the other side.

5. Plaintiff declared of a lease by baron and feme, and *shews it not to be by deed*. It was urged, that without a deed it could not be said to be the lease of the feme, and cited Pl. C. 436. and D. 91. and 15 E. 4. 8. but all the justices held it well enough; for it may be intended by deed, and yet no declaration thereupon; and though it be without deed, it is *well enough*, at least *during the life of the baron*, and it is a lease from them both during that time. Cro. E. 438. pl. 53. Mich. 37 & 38 Eliz. B. R. Bateman v. Allen.

S. C. cited Cro. E. 482. pl. 15. Trin. 38 Eliz. C. B. in case of Child v. Wiscott, and in 2 Rep. 61. b. Hill. 41 Eliz. C. B. in Wiscott's case, S. C. and upon

view of the judgment given in that case, and of another precedent, Pasch. 33 Eliz. between MOSLEY AND GUILBERT, and of another judgment in B. R. between DIGGS AND WITHERS, in all which precedents judgment was given for the plaintiff on demise made by baron and feme, without alleging it to be by deed, upon the view of which precedents, judgment was given for the plaintiff, in the case of Child v. Wiscott, alias Wiscott's case.

6. The baron was seised of lands for the life of the feme in right of the feme, the reversion in fee to the baron. A lease for years without writing by baron and feme of these lands is void against the feme. Cro. E. 656. pl. 20. Hill. 41 Eliz. B. R. Walfal v. Heath.

7. A woman sole takes a consideration for making a lease for 21 years, and then marries, and she and her husband made the promised lease. Before the 21 years end, the lessee surrenders, and takes a new lease for 21 years more. The husband dies; the wife ousts the lessee, who sues in chancery to have the first lease continued for the remainder of the first 21 years, and not remedied here, the surrender being voluntary. Cary's Rep. 29. cites 44 Eliz.

The plaintiff held two tenements of the husband and wife, and surrendered both in consideration that the husband and wife should

make a lease of one of them for three lives. The husband died; the wife being but tenant for life, and so by the statute would have avoided the lease for three lives, but the court thought good it should be holpen in equity. Mich. 13 Car. Toth. 155. Ireland v. Pavy. — 36 & 37 Eliz. Domesy v. Weiton, S. P. *ibid.*

8. In ejectment. Lease was made by baron of land claimed in right of his wife. The baron died before the action brought. It was therefore insisted, that the lease (the wife not joining) was void, and determined by his death, and that defendant cannot be said to keep him out of possession, and that now the lessee has no cause to have an hab. fac. poss. but the court held, that since the feme did not enter after the baron's death, the lease is not determined, but voidable only. Cro. J. 332. pl. 14. Mich. 11 Jac. B. R. Jordan v. Wikes.

Hob. 5. pl. 10. Wilkes v. Jordan, S. C. that the baron died before the day of the judgment, but held well.

9. Husband and wife (in the right of the wife) and a third person, were jointenants for the life of the wife and the third person. The husband and wife, by indenture, let the moiety for 21 years. The wife died. The surviving jointenant entered. All the court held, that it was a good lease, and should bind the survivor, for it is a

Baron and Feme.

lease made by her till after the coverture she, or one who claims in privity of her, avoids it, which cannot be by the other jointenant, for he is paramount the wife, and not under her, and judgment accordingly. Cro. J. 417. pl. 6. Hill. 14 Jac. B. R. Smalman v. Agborow.

10. A. and M. are seised of lands in fee in the right of M. the wife, and by indenture, dated 20th August, leased the same to B. and C. his wife, and D. their daughter, habend. to them ut supra dictum est, et eorum diutius viventi successive, from Mich. following, for their 3 lives, rendering yearly, during their 3 lives, 13s. 4d. at 2 usual feasts, and a heriot after the death of every of them. A. and M. his wife after Mich. made livery in person to B. and D. his daughter. After A. died, and M. his wife accepted the rent of B. Afterwards B. died seised, and C. his wife entered and died. D. entered, and M. entered upon her. Resolved, that this lease made by the husband and wife is good, and shall bind the wife, for the livery alone did not make the lease, but the livery and the deed, and it took its operation by both, and the livery in this case is but the execution of the deed, and is a sufficient witness of their agreement, and all the reservations and covenants, &c. in the deed are good, and the lessees and lessors are bound by them. Cro. J. 563. pl. 11. Hill. 17 Jac. B. R. Greenwood v. Tyber.

11. A widow being seised of lands secretly took a husband, and concealed her marriage, and so continuing under the notion of a widow, made leases of divers parcels of land, and afterwards the marriage was made public, and the husband in equity sought to avoid these leases, but was denied; and it was decreed to confirm the leases during the term. R. S. L. 204.

(F. a) In what Actions the Baron shall be charged during the Coverture; because of the Feme.

[1. If a feme sole binds herself in an obligation, and takes husband, the baron shall be charged for this during her life. 20 H. 6. 22. b.]

[2. So if a man enters into an obligation, and after enters into religion, the abbey shall be charged for this during the life of the monk. 20 H. 6. 22. b.]

[3. The same law of a trespass. 20 H. 6. 22. b.]

Brownl. 226.
S. C. held
accordingly.
2 Bulst. 80.
S. C. ad-
judged.—
Lane 48.
Doyle v.
Jolliffe.
Pasch. 7
Jac. in the exchequer, S. C. adjournus.

4. If an action be brought against a widow, who is found guilty, and before judgment marries, the capias shall be awarded against her, and not against her husband. And in this case of subsequent marriage, the husband not being once named in any part of the record, if the sheriff had returned that she now was married, he would have falsified all the proceedings. Cro. J. 323. pl. 1. Trin. 11 Jac. B. R. Doily v. White.

5. Case was brought against baron and feme, for that the *feme* Sid. 375. pl. 1. S. C. that judgment was stayed. —2 Keb. 399. pl. 2. S. C. and judgment stayed. affirming herself to be sole and unmarried, prevailed upon the plaintiff to marry her, whereby the plaintiff was much troubled in his mind, and put to great charges. After verdict it was moved, that the feme cannot, by any contract or agreement, charge the baron, and if he is chargeable in this case, it must be by this contract of her with the plaintiff * to marry him; and this marriage cannot be without the assent and contract of the plaintiff himself, and therefore shall not charge the baron, and of that opinion were the court, and gave judgment accordingly. Lev. 247. Mich. 20 Car. 2. B. R. Cooper v. Witham.

6. If a woman gives a warrant of attorney, and then marries, you may file a bill and enter judgment against both by the practice of the court. Ruled upon motion. Show. 91. Hill. 1 W. & M. Anon.

7. If a feme sole recovers damages, and then marries, and the judgment is reversed, restitution lies against her and her husband; per Holt Ch. J. 2 Salk. 587. pl. 1. Trin. 3 W. & M. in B. R. in case of the King v. Leaver.

(G. a) In what Actions the Baron shall be charged after the Death of the Feme; because of the Feme.

[1.] If a feme, lessee for life, rendering rent, takes husband, and dies, the baron shall be charged in an action of debt, for the rent incurred during the coverture, because he took the profits out of which the rent ought to issue. 10 H. 6. 11. curia.] Br. Debt, pl. 180. (181) cites S. C. accordingly.—Fitzh. Debt,

pl. 33. cites S. C. & S. P. by Babington. —F. N. B. 121. (C) S. P. and cites S. C. — So where a feme was tenant in dower, and she was to pay to the heir the third part of the rent which he paid over, and she takes baron, and dies, the rent being arrear, debt lies by the heir against the baron for this rent. Kelw. 125. pl. 83. casus incerti temporis.

A lease was made to a woman *dum sola* of a house, with the appurtenances, rendering rent; she married the defendant, and during the coverture, the rent being in arrear, she died, and the lessor brought an action of debt against the husband for this rent so in arrear. It seemed that the action well lies, according to 10 H. 6. 11. a. sed adjournatur; but afterwards it was adjudged for the plaintiff. Raym. 6. Hill. 12 Car. 2. B. R. Payne v. Minshall. — Lev. 25. Pasch. 13 Car. 2. B. R. Vane v. Minshall, S. C. adjudged that the baron here is chargeable in respect of the perception of the profits by himself, and so chargeable after his feme's death. —Keb. 20. pl. 57. Fane v. Minshaw, S. C. held accordingly, per tot. cur. for during the coverture he is assignee in law, and receives the profits, and therefore it is but reasonable that he should be charged. —Ibid. 22. pl. 63. S. C. & S. P. agreed clearly, and (Mallet J. absente) judgment for the plaintiff.

If a lease of lands be made to a feme sole for life, reserving rent, who marries, and the rent is arrear at the death of the wife, an action lies against the husband; per Powell J. Holt's Rep. 106. Pasch. 7 Ann. in case of Billingham v. Speerman.

[2. If a feme be indebted to another, and takes husband, and dies, the baron shall not be charged in debt for this after the death of the feme, because this was but in action. 10 H. 6. 10. 12. 20 H. 6. 22. b.]

[3. If a feme lessee for life takes baron, and dies, the baron shall not be charged for waste during the coverture; for he was never lessee. Co. 5. FOLIAMBE, contra 11 H. 6. 11.]

See tit. Waste, (R) pl. 10. and the notes there.

[4. The baron shall have trespass after the death of the feme, for a trespass done upon the land in lease to the feme during the coverture. 10 H. 6. 11. 6.]

S. C. cited
Lutw. 672.
Arg. and
said he had
seen the re-
cord of this
case, and
that no
judgment is
entered.—
S. C. cited
3 Mod. 189,
190. Arg.

[5. If A. takes B. an executrix to wife, against whom an action of debt is after brought as executors, and judgment given against them to recover *de bonis testatoris*, and thereupon a *fieri facias* issues to levy the debt and damages, and the sheriff thereupon returns a *devastavit*, and after the feme dies; whether execution upon this judgment may be sued against the baron, there not being any judgment upon the return of the *devastavit* to recover *de bonis propriis*. Mich. 9 Car. B. R. between TROTMAN AND JAMES, dubitatur. Intratur Tr. 9 Rot. 715.]

and says the husband is not chargeable, because the judgment is not properly against him, * he being joined only for conformity; but if upon the return of the *devastavit* there had been an award of execution *de bonis propriis*, that would have been a new judgment, and the old one *de bonis testatoris* had been discharged, and then the husband must be charged for the new wrong.—Where *devastavit* is returned against baron and feme executors, and judgment given that the plaintiff recover, and then the feme dies, adjudged that the baron is liable to execution, notwithstanding the death of the wife. Sid. 337. pl. 3. Trin. 19 Car. 2. B. R. Eyres v. Coward.—2 Keb. 238. pl. 15. Ayer v. Coward, S. C. adjudged for the plaintiff.—S. C. in a MS. Rep. of Ld. Ch. J. Kelyng, reported thus, viz. judgment was obtained against the defendant and wife as executrix, and a *devastavit* returned. They bring a writ of error. The wife dies, and execution is taken out against the husband. It was agreed by all, that by the death of the wife the writ of error is abated. Next it was agreed, that if no *devastavit* had been returned, the husband had not been chargeable after the death of the wife; but there being a *devastavit* returned, the husband is charged as for his own debt; and it was said it has been resolved, that after a *devastavit* returned against the husband and wife, action of debt will lie against the husband. MS. Rep. Pasch. 15 Car. 2. B. R. Ayres v. Coward.

* [143]

6. If a man takes a feme *seised of land by tort at the time of the espousals*, and the feme after the marriage occupies the land without the agreement or assent of the baron, yet action lies against both, as well for the occupation before the espousals, as after, during the life of the wife; but after her death the action lies not for this occupation against the baron. But if he, who right has, enters after the marriage, and the baron in the right of his wife re-enters; or if the baron after the marriage, and before any re-entry of him, that right has, occupies the lands, and then the feme dies, in this case trespass lies against him, &c. Kelw. 61. a. b. pl. 1. Pasch. 20 H. 7. B. R. Anon.

Yelv. 184.
Smith v.
Jones, S. C.
adjudged ac-
cordingly
per tot. cur.

7. Executrix married B. and then A. a legatee, threatening to sue B. for his legacy, B. promised payment in consideration of forbearance. B. pleads that his wife was dead before his promise supposed to be made. Adjudged that the wife being dead, B. is not chargeable; and though it were alleged that he had goods in his hands, yet it is not shewn how he had them, and he is thereby liable to the executor or administrator for them. Cro. J. 257. pl. 16. Mich. 8 Jac. B. R. Smith v. Johns.

8. One married a feme with a good personal estate; she died, and left a poor grand-child. It was resolved the husband ought to maintain the grand-child. 1 Sid. 114. cited by Hale Ch. B. as 7 Car. Worcester city v. Gerard.

Comb. 103.
S. C. and
judgment
affirmed.—

9. Judgment in debt was had against a feme sole, who afterwards married, and then the plaintiff brought a *scire facias* against the husband and wife to have execution; and after 2 *nihilis* returned, judgment

judgment was against them to have execution. *A year and day expired before any execution was executed.* The wife died. The plaintiff brought a new sci. fa. against the husband alone, to have execution of the said judgment. The court held, that the judgment on the sci. fa. against the husband and wife, made the husband liable; and so a judgment given in C. B. in Ireland, and affirmed in B. R. there, was affirmed here. Carth. 30. Pasch. 1 W. & M. in B. R. O'Brien v. Ram.

3 Mod. 186. Hill. 3 Jac. 2. B. R. the S. C. argued, but adjourned; but says that it was afterwards in 1 W. & M. affirmed.—

S. C. cited by Holt Ch. J. 1 Salk. 116. pl. 7. Mich. 9 W. 3. and 3 Salk. 63. pl. 2. S. C. cited by Holt Ch. J. 6 Mod. 257. Mich. 3 Ann. B. R. Skinn. 683. pl. 2. S. C. cited by Holt Ch. J.

10. A man marries an administratrix. The plaintiff obtains a decree against him and his wife for 1500l. She dies. Whether the plaintiff can proceed against the husband, without reviving against the administrator of the wife? It seems the husband is not bound to answer farther than the value of the estate which he had with his wife. 2 Vern. 195. pl. 177. Mich. 1690. in case of Jackson v. Rawlins.

11. Where there is a judgment against feme sole, and afterwards a scire facias, and judgment thereupon, against the husband and wife, and she dies, the husband is bound; per Holt Ch. J. Cumb. 311. Hill. 6 W. 3. B. R. in case of Curry & Ux' v. Stevens.

Carth. 30, 31. Pasch. 1 W. & M. in B. R. O'Brien v. Ram, S. P. adjudged accordingly in C. B. and affirmed in B. R. in error.—3 Mod. 186. S. C. and judgment affirmed. Comb. 103. S. C. and judgment affirmed.

cordingly in C. B. and affirmed in B. R. in error.—3 Mod. 186. S. C. and judgment affirmed. Comb. 103. S. C. and judgment affirmed.

* [144]

(H. a) What Actions the Baron shall have after the Death of the Feme. Because of the Feme.

Fol. 352.

[1.] If a feme having a rent for life takes husband, the baron shall have an action of debt for the rent incurred during the coverture, after the death of the feme. 10 H. 6. 12. 11.]

See (H) pl. 1. S. C.

[2. If the baron takes a seignore's to wife, he shall have, after the death of the feme, ravishment of ward, and ejectment of ward, if ousted in the life of the feme, of a ward fallen in the life of the feme. 10 H. 6. 11.]

[3. So he shall have debt for relief fallen in the life of the feme. 10 H. 6. 11. b.]

4. Debt was brought by R. W. executor of the testament of Alice his wife, executrix of the testament of H. B. upon an obligation of 20l. due to the testator, and the defendant was awarded to answer, notwithstanding it was the will or testament of a feme covert. Br. Dette, pl. 107. cites 4 H. 6. 31.

Br. Testament, pl. 9. cites S. C.

5. An action of battery for beating the wife was brought by the husband after her death. This, being a personal wrong, is dead with the person, Yelv. 89. Trin. 4 Jac. B. R. Higgins v. Butcher.

The action is gone by the death of the wife; per cur. Noy 18. Hig-

gins's case, S. C.—Brownl. 205. Higgins v. Butcher, S. C. seems only a translation of Yelv.

6. A personal thing (as action *for work done by the wife, who dies*) will not survive to the baron. 4 Mod. 156. Mich. 4 W. & M. in B. R. Buckley v. Collier.

1 Salk. 116.

pl. 7. S. C.

& S. P. ac-

cordingly, by

Holt Ch. J.

—Comb.

455. S. C.

adjoinatur.

—Carth.

415. S. C.

adjudged.—

And though

the judg-

ment in the

sci. fa. does

not alter the

nature, yet it

changes the property of the debt, and debt may be brought on an award of execution; per Holt Ch. J.

Skin. 683. S. C.—S. C. cited by Holt Ch. J. 2 Ld. Raym. Reg. 1050. Mich. 3 Ann. at the bottom.

7. Error upon a judgment in C. B. in scire facias, where a *feme sole recovered in C. B. and took husband*, and after they joined in a *scire facias to have execution, and had judgment in the scire facias*, the wife died, and the husband sued execution, without taking out letters of administration; and ruled, that the judgment in scire facias attached a joint interest in baron and feme, and if the husband died, it would survive to the wife, & e contra. *A scire facias is an action, and is in the nature of an original*, and if they had recovered in an original, there could be no question in the case; and by the judgment in the scire facias in this case the debt vests, and of such opinion was the court. Skin. 682. pl. 2. Mich. 9 W. 3. B. R. Woodyer v. Gresham.

[145] (I. a) Where the Default of the Baron is the Default of the Feme, so that the one shall not answer without the other.

1. **Q**UID juris clamat against baron and feme, and the *feme was received in default of the baron*, and pleaded in bar for part, and confessed for the rest ready to attorn, and was not permitted in the absence of her baron, but distringas ad attornand' awarded. Br. Coverture, pl. 19. cites 21 E. 3. 1.

2. *Trespass against baron and feme, he came, and she not*, he shall answer; and *contra if she comes and he not*, and *she shall not answer till he comes, or till he be outlawed*. Br. Responder, pl. 32. cites 22 Aff. 46.

S. P. for she was not named by her name of coverture, but by her proper name only. Br. Exigent, pl. 34. cites S. C.

3. *Trespass against baron and feme; at the exigent the baron came, and the feme not*, and because the *feme was mis-named in the exigent*, therefore *exigent de novo issued against her*, and *idem dies* was given to the baron, and yet the baron was compelled to answer immediately. Br. Baron and Feme, pl. 87. cites 39 E. 3. 18.

Debt against baron and feme, they were outlawed, and each of them

4. If the *baron be outlawed, and gets charter of pardon, and brings scire facias*, it shall not be allowed if he does not bring in his feme with him. Br. Baron and Feme, pl. 10. cites 40 E. 3. 34.

sued a charter of pardon, and sued sci. fa. and found mainprize; the sheriff returned tarde, and the baron appeared, and the feme not, and the baron alone would have sued scire facias sicut alias upon the first mainprize, or scire facias de novo, and new mainprize, and was not suffered without the feme. Br. Baron and Feme, pl. 19. cites 44 E. 3. 3.

Baron and feme were outlawed, and the feme appeared and shewed charter of pardon, and it was not allowed, because the baron did not appear, and the cannot plead without her baron, by which she was suffered to go at large. Br. Baron and Feme, pl. 39. cites 11 H. 4. 89. — Br. Utlagary, pl. 13, cites 11 H. 4. 99. S. P. [but it seems misprinted, and that it should be 89. besides, there are not so many pages as 99.]

5. The default of the feme in dower against baron and feme is the default of both, by which the demandant recovered seisin of the land; quod nota. Br. Baron and Feme, pl. 12. cites 41 E. 3. 24. Br. Default, pl. 5. cites S. C.

6. Detinue against baron and feme; the baron rendered himself at the exigent, and the feme not, and the baron prayed that the plaintiff may count against him, and was compelled, notwithstanding the default of the feme, because the process is determined against him, and he counted of a bailment to the feme when she was sole, and therefore the baron was not compelled to answer without his feme, but went quit; quod nota; for the baron shall not have corporal pain for his feme, for he shall not be imprisoned till the feme comes, but by such default the baron shall lose issues. Br. Exigent, pl. 52. cites 43 E. 3. 18. Br. Baron and Feme, pl. 63. & 75. cites S. C. — S. C. cited Le. 138. pl. 189.

7. And so it was in præcipe quod reddat; grand cape shall issue for such default of the feme. Br. Exigent, pl. 52. cites 43 E. 3. 18. In a præcipe against husband and wife, the default of

one of them is the default of both; for one cannot answer without the other; it is no inconvenience to the wife, for upon default after default of the husband she may be received to defend her right. Jenk. 27. in pl. 50. cites 26 H. 6. Default 4.

In writ of land against baron and feme, he made default, and she said that she was sole, and not covert, and was ready to answer, but the court would not receive her, but awarded grand cape, and at the return thereof, if the baron did not come, she should have her plea. Thel. Dig. 119. lib. 11. cap. 2. f. 3. cites Pasch. 6 E. 3. 249.

8. Trespass against baron and feme; at the exigent the sheriff returned that he had taken them, and the baron came in ward, and the feme not, and the baron was compelled to answer without his feme, and pleaded not guilty; quod nota; contrary in debt. Br. Baron and Feme, pl. 18. cites 44 E. 3. 1. [146]

9. Debt against baron and feme, the baron rendered himself, and the feme was returned waived, by which the baron went quit by judgment, and was not compelled to answer. Br. Responder, pl. 40. cites 11 H. 4. 56. If feme covert and her baron, and others, are defendants, as executors

or administrators, and she comes without her baron, she shall not be compelled to answer without her baron, notwithstanding the statute. Br. Responder, pl. 10. cites S. C. — Fitzh. Responder, pl. 17. cites S. C.

10. In debt or trespass against baron and feme, nor in any personal action, if the baron appears and the feme not, or via versa the one shall not answer without the other, but if the feme be waived, the baron shall go fine die; by all the justices. Br. Baron and Feme, pl. 8. cites 4 H. 6. 29. & 44 E. 3. 1, accordingly. Le. 138. pl. 139. cites the Book of Entries 187. where debt was brought against the husband and wife, and

process continued until the exigent; the husband rendered himself, and the wife was waived, and judgment given, quia videbatur iusticiariis hic that the husband absque præfata uxore sua respondere non potuit, & rationi dissonum sit ipsum in curia hic, cum in eadem loquela respondere non potuit, ultimus detineri, idco eat inde fine die.

Br. Corone,
pl. 50. cites
S.C. & S.P.

11. Feme covert shall answer to *felony* without her baron; per Littleton; and so they are not one person in law to all intents. Br. Baron and Feme, pl. 49. cites 15 E. 4. 1.

12. The *wife's* answer was admitted without the *husband's*, he pretending to plead to the jurisdiction of the court. Toth. 74. cites 4 Jac. Trentham v. Kinnerley & Ux.

13. An *attachment against the wife alone*, and not the husband; for that she would not answer the bill. Toth. 77. cites Mich. 4 Jac. Keies v. Macher.

14. Upon a *latitat* against the husband and wife, a *cepi corpus* was returned for the wife; but non est inventus for the husband. Resolved, that nothing could be done in this case, unless there were bail put in by the husband; for a woman without her husband cannot be sued, nor put in bail, and therefore, because the plaintiff could not declare, the wife was discharged. Cro. J. 445. pl. 2. Mich. 15 Jac. B. R. Anon.

15. In an *information for recusancy of the feme*, it was said that the feme cannot join issue without the baron; for in 42 E. 3. she cannot *plead to outlawry* without her baron; and in 11 H. 4. she cannot *plead pardon* of the outlawry without her baron. Arg. quod fuit concessum per curiam. 2 Roll. Rep. 90. Pasch. 17 Jac. B. R. in Sir Geo. Curson's case.

16. A wife to answer without her *husband*, he being *beyond sea*. Toth. 75. cites 11 Car. Portman v. Popham.

If the bill
against baron
and
feme be for
a demand
out of her

17. *Wife's answer* is no answer, being made *without the husband's* answer, and no process in such case can be had against the wife. Arg. 2 Chan. Cases 173. Hill. 1 Jac. 2. in case of Ld. Ward v. Ld. Meath.

separate estate, and the baron is beyond sea, and not amenable by the process of the court, if she be served with a subpoena, Ld. Cowper held the process regular, rather than there should be a failure of justice, and she must appear and answer. 2 Vern. 613. pl. 551. Trin. 1708. Dubois v. Hole & Ux.

* [147]
Gillb. Equ.
Rep. 83.
S. C. re-
ported in
totidem ver-
bis.—Abr.
of Cases in
Equity, 65.
pl. 8. S. C.
cites no
book.

18. Where the feme reserved the power of her own estate, the husband being much in debt, and to *discharge his goods*, going to *be taken in execution*, she gave a note to pay the debt out of her own separate estate, * and accordingly the action was discharged. On a bill against baron and feme, the baron could not be met with to be served with a subpoena; but the wife was enforced by attachment without him, he being made a party only for conformity. Chan. Prec. 128. pl. 249. Hill, 1711. Bell v. Hyde.

Select Cases
in Chan. in
Ld. King's
Time, 24.
S. C. but
very short,
and only
says, that a
separate an-
swer put in
by the wife

19. Though a *separate answer of a feme covert ought regularly to have an order to warrant it*, yet if it be put in without an order, but done deliberately by good advice, and she fully apprised thereof, and done at her request, and with consent of her husband, and the plaintiff accepts of it, and replies to it, and the answer being to the feme covert's advantage, neither she in her life, nor the husband after her death, or any on her behalf, can assign this which was done in her favour as an irregularity; and so was resolved by Ld. C. King to be regularly put in. 2 Wms.'s Rep,

Rep. 371. Trin. 1726. the Duke of Chandois v. Talbot & Ux.

for that purpose, is irregular.——The wife by order of court answered separately. Cases in Equ. 42. in Ld. Talbot's Time, Mich 1734. Penn v. Peacock & Ux.

alone, without order of the court

20. On a motion to suppress the answer of the defendant, for that she *marrying after the bill filed, and before answer put in*, had put in her answer without her husband. But Ld. C. King said, that marrying pendente lite does not abate the suit, and though there is no charge in the bill against the husband, or subpoena served on him, yet he *must join* in the answer of the wife for conformity; for no married woman can put in an answer without her husband, by the rules of the court, *without special leave* of the court, and an order for that purpose. MS. Rep. Hill. 4 Geo. 2. in Canc. Abergavenny v. Abergavenny.

2 Wms.'s Rep. 311. pl. 88. Abergavenny v. Abergavenny, is not the S. P.

(K. a) Arrest, &c. of Feme.

1. *TRESPASS* against baron and feme. The baron was outlawed by the exigent, and the feme surrendered herself, and because the feme shall not answer without her baron, and he is outlawed, therefore she went quit. Br. Baron and Feme, pl. 10. cites 40 E. 3. 34.

2. If feme covert makes actual disseisin with force, she shall be imprisoned. Arg. 2 Brownl. 96. cites 9 H. 4. 7. b. 8 E. 3. 52. 22 E. 2. Damages 20. 27 H. 6. Ward 118.

3. In assise against baron and feme, she shall be attached by the goods of the baron; for she is amenable by the baron. Br. Baron and Feme, pl. 45. cites 7 H. 6. 9. by the best opinion.

Br. Attachment in Assise, pl. 4. cites S. C.

4. The husband appears and the wife not. Attachment went against them both. Cary's Rep. 92. cites 19 Eliz. Monox v. Abel & Ux'.

So where the baron only appeared and

demurred. Cary's Rep. 52. 1 Elis. Spicer v. Pakine.

5. The husband and wife were outlawed; the wife came in in ward by process, and brought a charter of pardon. The court held that she shall be discharged of the imprisonment; but the charter cannot be allowed, because she cannot sue scire facias against the plaintiff, to make him declare upon the original without her husband, and the pardon is with condition. Ita quod ipsa stareat recta in curia. D. 271. b. pl. 27. Hill. 10 Eliz. Anon.

Process in debt against baron and feme continues till the exigent, the baron appears, but will not suffice for the wife

to appear; and it was ruled per cur. that in this case she may make attorney, to prevent being waived. D. 271. b. marg. pl. 27. cites 42 Eliz. C. B.

* When baron and feme are taken on a *capias utlagatum*, the feme shall be discharged; per Holt. Farr. 82. Mich. 1 Ann. B.R. obiter.

6. In debt against husband and wife, executrix of her former husband, the husband appeared upon the exigent, and would have put in a supersedeas for himself alone, without appearance or supersedeas for the wife, and so the court at first thought he might; but upon a precedent shewed of 18 Eliz. in one SOMMERS'S CASE, who would

* [148] Le. 138. pl. 189. S. C. and after the justices had advised thereof, the would

superfedeas was stayed, without recording the appearance of the husband; and

Lady Malory's case was cited, where the husband appeared; and put in superfedeas for himself only; but it was not allowed, but process continued till outlawry.

A superfedeas was put in for the feme on an exigent against the baron and feme, and on much debate it was agreed, that the feme (for the safeguard of herself from imprisonment) being returned upon the exigent, or upon the capias, viz. upon the one quod reddidit se, upon the other cepi; and as to the husband (non est inventus) may appear [her appearance may be entered;] and so long as the process continues against the husband, she shall have idem dies; but when the baron is returned utlagatus, she shall be discharged without idem dies, and that stand well, and reconciles all the books; but whether she shall have a superfedeas de non molestando is doubtful; for by the 11 H. 4. 89. and D. 271. if the baron be outlawed, and the wife waived, and the king pardons the feme, that shall be allowed, and she shall go free die; and see 4 E. 1. 14. and 14 H. 6. 14. 11 H. 4. 1. and it seemed by all to be agreed, that the baron after he purchaseth his pardon, or after he comes and reverses the outlawry, he shall not have allowance of his pardon, nor his appearance received, unless he brings in his feme, who by presumption of law is amefnable by him; but the baron is not amefnable by the feme. Hut. 86. Hill. 2 Car. Anon. — Cro. J. 58. pl. 2. Smith v. Ash, S. C. and the exigent appointed to be filed against both. — Litt. Rep. 18. S. C. accordingly.

7. The wife was *executrix* of her first baron, and upon a *devastavit returned*, a *ca. sa. issued against both de bonis propriis*. The baron was in the Fleet, and the feme was brought into court by hab. corp. and prayed that she be committed also to the Fleet; but Anderson moved that she should not; for if she and her 2d baron had been joint executors, or if she had not proved the will, or administered during her widowhood, she should not be charged in *devastavit*, because then it was the act of the baron. But she was committed, because it appears that she was executrix, and that she administered when she was sole, and then the *devastavit* of the baron shall be said the act of the feme. D. 210. a. pl. 23. marg. cites Mich. 38 & 39 Eliz. C. B. Vaughan v. Thompson.

Noy 13.
Ampton v.
Stockburn.
Per Pop-
ham, the ca-
pias must be against the feme only; but cites 9 E. 4. 24. a. contra. — See tit. Amercement (D. a) pl. 9. and the notes there.

8. In debt on bond made by the wife *dum sola fuit*, judgment must be that baron and feme *capiantur*. Mo. 704. pl. 982. Hill. 39 Eliz. Bardolph v. Perry & Ux.

9. The defendant and his wife were committed to *Newgate* for not performing an order. Toph. 157. cites 10 Jac. Westdeane v. Frizell & Ux.

Brownl 226.
S. C. held
accordingly.
— 2 Bulst.
80. S. C. ad-
judged —
Lane, 48. Doillie v. Jolliffe, Pasch. 7 Jac. in the exchequer, S. P. and seems to be S. C. adjor-
natur.

10. *Widow pending a suit against her, takes husband*. The plaintiff recovers against her. Per tot. cur. the capias shall be awarded her, and not the husband. Cro. J. 323. pl. 1. Trin. 11 Jac. B. R. Doyley v. White.

3 Bulst. 150.
Wood & Ux.
v. Sutcliff,
S. P. per
Coler Ch. J.

11. Baron and feme in execution. The feme escapes. Debt lies against the marshal; per 3 justices against 12 2 Bulst. 320. Hill. 12 Jac. Sutcliff v. Reynolds.

12. Action was brought against baron and feme, and an attorney appears for the baron alone; per cur. it is the appearance of baron and feme in law. Brownl. 46. Pasch. 12 Jac. Anon.

Appearance for the husband will not be received without an appearance for the wife too.

6 Mod. 86. Mich. 2 Ann. B. R. in case of Wigg v. Rook.

13. The baron shall never be charged for the act or default of the wife, but when he is made a party to the action, and judgment given against him and the wife. As for the debt of the wife, or scandal published by the wife, or trespass by her, &c. so that in indictments of her, he shall not be charged for the fine set upon her. 11 Rep. 61. b. Mich. 12 Jac. in Dr. Foster's case.

14. Latitat against baron and feme. The feme was arrested, but baron was not found. The feme is dismissed; for there can be no declaration till the baron be taken, and has put in bail. Cro. J. 445. pl. 23. Mich. 15 Jac. B. R. Anon.

It was said that the plaintiff should sue them by process of outlawry, and so he might have remedy. Ibid.

15. Feme sole enters into bond, and then marries. Debt is brought against them on the bond, and they deny the deed. The baron shall be taken for the fine as well as the wife; for she had nothing to pay the fine with. And so in trespass against the baron and feme, and they both are found guilty, both shall be taken for the fine, which the prothonotaries agreed to. Het. 53. Mich. 3 Car. C. B. Johnson v. Williams.

Dal. 39. pl. 11. 4 Eliz. Anon. S. P. and Het. seems only a translation of Dal.

16. Assault and battery was brought against the husband and wife, for a battery by the wife, and defendants were found guilty. The judgment shall be quod capiatur against the baron only. Cro. C. 513. pl. 8. Mich. 14 Car. B. R. Anon.

17. Where an action, in which bail is required, is brought against an attorney and his wife, he must put in bail for himself and his wife, and therefore the declaration being against the wife in custodia, and the husband in propria persona, it was ordered that querens nil capiat per billam. Sty. 226. Trin. 1650. B. R. Elsy v. Mawdit.

D. 377. a. pl. 30. Trin. 23 Eliz. Powle's case, S. P. where the husband was clerk of the crown

in chancery. — S. C. cited Vent. 299

18. If there be cause to have special bail, the wife must lie in prison till the husband appears, and puts in bail for her; for she cannot put in bail for herself, being covert baron; per Glyn Ch. J. Sty. 475. Mich. 1655. B. R. Attlee v. Lady Bantlingas.

19. In debt against husband and wife for her debt dum sola, he was outlawed, and she was waived, and taken and imprisoned; but the husband could not be found. It was moved, that she might be discharged upon an affidavit that she was but 17 years old when she married, and so could not be debtor; and as to the outlawry, that she was pardoned by the general pardon. She was discharged. Sid. 20. pl. 2. Hill. 12 Car. 2. C. B. Biron v. Bickley.

20. Debt upon bond sealed by both, and both were taken by capias. Per cur. an habeas corpus to bring them into court might be

be without motion, in order that the baron only may be committed, and the *feme* discharged. Lev. 1. Mich. 12 Car. 2. B. R. Slater v. Slater.

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21. The secondary, upon search, reported all the precedents to be, that *unless the wife be arrested, or the husband give bond for her appearance, he shall not be forced to put in bail for both, if he will lie in prison*; but else he shall, before he can be bailed in debt brought against both, upon a *statute entered into by the feme dum sola*, which the court agreed. Keb. 225. pl. 39. Hill. 13 Car. 2. B. R. Cranmer v. Andrews.

22. The *husband in custodia*, in a writ where he and his wife are named, *must appear for himself and wife*; but is not forced to put in special bail for her, if she be not arrested; but the sheriff may, upon the arresting him, take an obligation for good bail, which by Hern, secondary, is the constant practice of the court; but he must find special bail for himself. Keb. 241. pl. 82. Hill. 13 Car. 2. B. R. Nevil v. Cage & Ux'.

The feme entered into an obligation *dum sola*, and after married the defendant. Debt was brought against her,

23. The *husband confessed a judgment* against himself and his wife as *for a debt owing by the wife dum sola*; whereas it appeared upon examination, that *it was contracted after the marriage*, and this was on purpose to take the wife in execution; but it appearing that the baron was in execution also, the wife was discharged; and so she should, had the contract been before the marriage. Lev. 51. Mich. 13 Car. 2. B. R. The Lady Chaworth's case.

and she being in prison, and the plaintiff, after knowing of the marriage, brought another writ against the baron and feme, and took the baron also, and declared against both in custodia. The court on motion discharged the feme; for the baron only is to be imprisoned, and before he shall be discharged, shall find bail for himself and her. Lev. 216. Trin. 19 Car. 2. B. R. Whitfield v. Holmes.

Feme covert *sued a bond*, and being arrested and carried to prison, the court, upon affidavit made that she was covert, and entering her appearance, discharged her without bail. Freem. Rep. 210. pl. 216. Trin. 1676. Lady Thornborough's case.

Keb. 198. pl. 194. S. C. it was moved to discharge her, it being an arrest on mesne process only, and to say she is in custodia, is no reason, because when he comes in he shall find bail for himself and

24. In debt against baron and feme, if *upon the latitat the feme appears*, she shall be accepted; per cur. But where she is in execution, she shall not be discharged, nor could the Lady Baltinglas, who was in custodia only upon process; but per cur. she ought to be discharged, and that without bail, if it *appear upon the writ that she is a feme covert*; but if she be *sued as a feme sole*, she shall put in bail; and by Twisden, it is an unreasonable course, that because she cannot appear by reddidit se, but in custodia, therefore she should not be dismissed as in C. B. else this would be as good as a divorce, a continual non est inventus being returned against the husband, and no declaration can be against her, and so she shall always be in prison. Adjournatur. Keb. 189. pl. 171. Mich. 13 Car. 2. B. R. Bars v. Desman.

his wife, and so the plaintiff may declare against them both in custodia, and per cur. she was discharged, nisi. Twisden said, that there had been 3 opinions, viz. 1st, That she should lie in prison till the husband come in, and that is unreasonable. 2dly, That she ought to file common bail, if another will be bound for her, which may prevent a fraud in arresting of her at the beginning of a long vacation; this the court conceived reasonable, but it is at the election of the wife, whether she will or not. 3dly, That she ought to be discharged without bail, which the court conceived reasonable, and so awarded here. Ibid.

Baron and Feme.

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25. *Feme covert in suit against baron and feme is arrested, and gives bond for her appearance, and now prayed to be delivered on common bail, the sheriff having returned cepi corpus of the baron and feme both, having only taken her, which the court denied after return of cepi corpus; contra, if non est inventus had been returned as to the husband; but yet, if it appears only a practice, they will discharge her, to examine which they gave rule for the sheriff to return the body of the husband.* Keb. 367. pl. 62. Mich. 14 Car. 2. B. R. Dethick v. Yaxley & Ux.

If feme covert be arrested, let cause of action be what it will, she shall be discharged upon common bail; but if husband is arrested, he shall not be

discharged by giving bail for himself without giving it for his wife likewise. 6 Mod. 17. Mich. 2 Ann. B. R. Cornish v. Marks. — S. P. by Twissan J. Mod. 8. pl. 24. Mich. 21 Car. 2. and said, that so it was done in Lady Balking's case, and that where it is said in Crooke, [Cro. J. 445. pl. 23. Anon.] that the wife in such case shall be discharged, it is to be understood that she shall be discharged upon common bail; and so Livezey said the course was. — If it be clear and notorious that she is covert, common bail ought to have been received, but if it be doubted, she ought to find special bail; per cur. 6 Mod. 105. Hill. 2 Ann. B. R. Anon. — S. P. if the cause requires special bail. 7 Mod. 10. Pasch. 1 Ann. B. R. per Holt Ch. J. Anon.

26. *Debt against husband and wife, for a debt supposed to be due by her dum sola; special bail was put in. Judgment was had against them, and they surrendered themselves in discharge of the bail. It was moved to discharge the feme, because no debt was due from her dum sola, but this action was contrived between the plaintiff and the husband, to make her a prisoner. It was agreed, that if the wife is taken upon mesne process before her husband, she shall be discharged, and when the husband is taken, he shall give an appearance for both; but it was said, that upon an execution the wife may be taken first; but dubitatur what should be done; & adjournatur.* Sid. 395. pl. 2. Mich. 20 Car. 2. B. R. Gabry v. Gabry.

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Vent. 51.
Mich. 21
Car. 2. B. R.
Jackson v.
Gabree, S. C.
the gaoler
let the husband
escape.
It was moved
to discharge
the wife,
because the
husband
took no care
of her, but
let her lie
there in a

very necessitous condition. At first the court doubted what to do, but afterwards resolved, that unless the plaintiff would get the husband taken again, as he might do, they would discharge the wife, and said, that the escape of the husband was the escape of the wife. — 2 Keb. 576. pl. 98. S. C. and per cur. if the husband will lie in prison the wife must do so too; but if he will put in bail for himself, he must do so for his wife also; but if he will not appear, or this were not in execution, she should be discharged; and it was referred to the secondary to examine the practice, and if they were in execution or not. — Sid. 395. in S. C. the reporter adds a note, that there was a case in C. P. 12 Car. 2. as he remembers, between HUNT AND DRAKE AND Ux. which was the same as this, only that the baron was prisoner before, and that it was by contrivance to take his wife, who was the sister of Sir John Potts; and that Bridgman, then Ch. J. there, and the other justices, discharged the feme, but first they examined the practice, and ordered that the judgment should be taken off the roll.

27. *If they are arrested in an action which requires special bail, and the husband puts in bail for himself, he must put in bail for his wife also; but if he lies in prison, the wife cannot be let out upon common bail.* Vent. 49. Mich. 21 Car. 2. B. R. Anon.

But it is otherwise, if the husband absconds, and cannot be arrested. Vent.

49. Mich. 21 Car. 2. B. R. Anon. — In such case she shall not be discharged but upon common bail, and then new process shall go against the baron, with an idem dies given to the wife; per Holt Ch. J. 1 Salk. 315. in pl. 3. Hill. 7 W. 3. B. R.

28. *A judgment in a sci. fac. was had against a feme upon a former judgment upon two nihil returned, but before the sci. fac. brought she was married to A. and was brought against her as sole by contrivance between the plaintiff and her baron to oppress her, and lay her up in prison, and she could not help herself by error or*

3 Keb. 27.
pl. 47. Lady
Prettyman
v. Marshall,
S. C. the
court in-
cluding ac-

audita

cordingly,
but adjourn-
ed it for the
same reason.

audita querela, because her baron would release, and the plaintiff knew of her being married. The court said, that this judgment might be set aside for the misdemeanor of the plaintiff; but being informed that the marriage was under debate in the ecclesiastical court, and near to sentence, they suspended making any rule till that was determined. Vent. 208. Pasch. 24 Car. 2. B. R. Lady Prettyman's case.

29. Plaintiff brought a *bill against the husband and wife*, who was the daughter of the plaintiff. *The husband puts in a plea, and swears to it, but the wife refused to swear to it.* Upon suggestion that the wife's refusal was in combination with her mother, it was ordered, that the plea stand as for the husband, and the plaintiff to proceed against the wife. Ch. Cases, 296. Hill. 28 & 29 Car. 2. Pain v. . . .

30. Writ against husband and wife. *The wife was taken, and offered bail for herself*, but the bailiffs insisted on bail for her husband also, who was not taken, and committed her, and an attachment was granted against the bailiffs; for though the husband is compellable to give bail for himself and his wife, yet so is not the wife, but for herself only; but per Holt, if we grant an attachment, they shall not take an action, they ought not to have two remedies. Cumb. 304. Mich. 6 W. & M. in B. R. Hellier v. Condy.

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S. P. by
Kemp, se-
condary, and
said it had
been the
practice of
B. R. for
40 years of
his know-
ledge. Goldb. 127. pl. 19. Hill. 43 Eliz. Anon.

31. If an action be brought against husband and wife, and the husband is arrested, he shall give a *bail bond* for the appearance of him and his wife, and must put in bail *for both*; but if one brings an action against the husband only, he cannot declare against husband and wife; per Holt Ch. J. 1 Salk. 115. pl. 3. Hill. 7 W. 3. B. R. in the case of Carpenter v. Faustine.

Gillb. Equ.
Rep. 83.
S. C. in to-
tidem verbis.

32. Upon a suit in chancery against baron and feme, wherein the baron was made a party only for conformity; she was taken up on an attachment for not putting in her answer, and could not be discharged without entering her appearance with the register, and paying costs of the motion. Ch. Prec. 328. pl. 249. Hill. 1711. Bell v. Hyde & Ux.

(L. a) Where the Baron is banished, or an Alien, or beyond Sea.

Br. Nona-
bility, pl. 9.
cites 2 H. 4.
7. S. C. and
some of the
justices said,
that it was
because she
was the
king's ser-
vant. — Br. Baron and Feme, pl. 66. cites S. C. accordingly; but Brooke says, quære, and says
vide

1. **W**ILAND was banished 18 E. 1. by parliament, and his wife had her jointure, by advice of all the judges and others; per Coke Ch. J. and per Doderidge, in the abridgment there are divers cases in time of H. 1. and H. 3. accordingly, and 10 E. 3. the wife of Matravers brought writ of dower, Matravers being banished. Roll. Rep. 400. pl. 27. Trin. 14 Jac. in Wilmore's case.

Br. Baron and Feme, pl. 66. cites S. C. accordingly; but Brooke says, quære, and says vide

vide 1 H. 4. 1. — Br. Brief, pl. 422. cites S. C. — Jenk. 4. pl. 4. cites S. C. — 3 Bulst. 188. Coke Ch. J. says, her dower was allowed. — Mo. 851. S. C. cited in Eliz. Wilmot's case.

2. If the *baron forejures the realm*, the feme is a person able to alien her land without the baron. Br. Baron and Feme, pl. 81. cites 31 E. 1. and Fitzh. Cui in Vita 31. Br. Cover-
ture, pl. 76.
cites S. C.

3. The king brought *quare impedit* against the wife of an exile; per Doderidge J. Mo. 851. in pl. 1159. cites 10 E. 3. 399.

4. The plaintiff shewed by his bill, that he freighted a ship into Spain, which was there confiscate and all his goods; for the defendant's husband, being *master of the ship*, had an English book found in the ship, contrary to the laws there, which he was forewarned of, and knew the laws, and the defendant's *husband was condemned to the galleys for 14 years*, and the plaintiff, as well for his own relief as for the relief of the defendant, devised to obtain licence from her majesty, for transporting 60 tuns of beer yearly, for 8 years, the profits whereof to be equally divided between them, and the bill exhibited to her majesty was in both their names, and the party of the charge, but the defendant cautiously got the same altered into her own name, and hath sold the same away without yielding the plaintiff any profit; the defendant doth demur, because she is a feme covert; it is ordered a subpoena be awarded against her to make a better answer. Cary's Rep. 143, 144. cites 22 Eliz. Castleton v. Alice Fitz-Williams.

5. The *wife may sue in her own name in her husband's absence beyond sea*, as in case of assault, &c. but she cannot be sued before he * returns again; per Williams J. and the whole court. Bulst. 140. Trin. 9 Jac. Anon.

the feme of an exile may sue alone, and cited 2 H. 4.



Mo. 666. in pl. 910. it was admitted per cur. Pasch. 44 Eliz. that

6. The wife shall be accounted as feme sole in case of banishment and *abjuration*; per Coke. Roll. Rep. 400. pl. 27. Trin. 14 Jac. in Wilmore's case.

mortuus, and the husband being disabled to sue for the wife, it would be unreasonable that she should be remediless; and so it would be equally on those who had any demands on her, that not being able to have any redress from the husband, they should not have any against her. G. Hist. of C. B. 198. — And may make a will. 2 Vern. 104. Countess of Portland v. Prodgers.

7. A *feme covert brought trespass by the name of a widow*. The defendant pleaded that *she was a feme covert, viz. the wife of J. Wilmot, who was in full life at Lisbon in Portugal*. The plea was disallowed by the court for impossibility of trial. Mo. 851. pl. 1159. Trin. 14 Jac. B. R. Wilmot's case.

8. *Assumpsit for wages and money lent*; on *non assumpsit* the defendant proved she was married, and her husband alive in France. The jury found for the plaintiff; upon which, as a verdict against evidence, she moved for a new trial, but it was denied; for it shall be intended she was divorced. Besides the husband is an alien enemy, and in that case, why is not his wife chargeable as a *feme sole*,

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3 Bulst. 188. S. P. per Coke, S. P. for then he is civiliter

Ld. Raym. Rep. 147. S. C. It was moved that the verdict against her, was against evidence and

law; for
that a feme
covert can-

sole, as much as if he had abjured or been banished. 1 Salk. 110.
Deerly v. Duchefs of Mazarine.
not be sole charged without divorce and alimony, although the husband be a foreigner. But Holt Ch. J. thought, that such husband being under an absolute disability to come and live here, the law perhaps will make such wife chargeable as a feme sole for her debts and contracts. And the reporter says, that afterwards the plaintiff had his judgment, as Mr. Coleman told him. — Cumb. 402.
S. C. adjournatur.

9. Bill against baron and feme for a demand out of the separate estate of the feme, and the *baron is beyond sea*, and not to be come at by the process of the court; yet if the feme is served with a *subpœna*, she must appear and answer the plaintiff's bill; per Cowper C. 2 Vern. 613. pl. 551. Trin. 1708. Dubois v. Hole.

(M. a) Where they are said to be one Person in Law.

1. *COSINAGE* against baron and feme and 6 others of a carve of land, &c. 2 appeared and the others made default, by which issued *grand cape* of 5 parts, and they made default at another time, and the two appeared again, and the demandant counted against them, that the 2 wrongfully deformed him of two parts of the carve of land in 7 parts divided; per Rolf, there are 8 persons, therefore it should be in eight parts divided. Per Martin, the count is good, for the baron and feme are not but one person in law, and therefore well, quod curia concessit. Br. Count, pl. 44. cites 4 H. 6. 26.

Br. Aid, pl.
74. cites
S. C.

2. The baron in replevin shall have aid of his own feme after avowry, and process by summons to bring her in. Br. Baron and Feme, pl. 46. cites 7 H. 6. 45.

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3. Baron and feme are not one person to have the privilege, because the baron is servant of the chancellor, nor *essoign de servitio regis*, nor other *essoign* cast by the baron shall not serve the feme, but protection for the baron shall serve both; nor feme of an attorney shall not sue by bill as her baron shall do. Br. Baron and Feme, pl. 9. cites 35 H. 6. 3.

Br. Baron &
Feme, pl. 49.
cites S. C.
& S. P.

4. Feme covert in case of felony shall answer without her baron, and so are not one person to all intents; per Littleton. Br. Cozone, pl. 50. cites 15 E. 4. 1.

5. Baron and another referred a matter to arbitration. The arbitrators award the feme to join in a fine of the land, about which the reference was; this award as to the feme is void, for she is not comprised in the submission, but the baron is liable to be sued on his bond if he does not do it; per Frowike Serj. Kelw. 45. b. pl. 2. Trin. 17 H. 7. Anon.

6. *Payment to the feme* of money awarded to the baron is no *plea* in action of debt on the bond; and judgment for the plaintiff. Le. 320. pl. 401. Trin. 31 Eliz. B. R. Froud v. Bates.

So of payment of rent, though due on a lease made by the

wife *dem sola*, and that the lessee had no notice of her marriage, and the baron may make the lessee pay it over again. Cro. J. 617. (bis) pl. 7. Mich. 19 Jac. B. R. Tracy v. Dutton.—Palm. 207. S. C.

7. In account of the receipt of 10l. by the hands of the plaintiff's wife; defendant waged his law, and at the day he had to wage his law, it was doubted whether it lay, because the receipt is supposed to be by another's hand. But because a receipt by the hands of the wife of the plaintiff or defendant is all one receipt by their own hands; he was received to wage his law. Cro. E. 919. pl. 12. Hill. 45 Eliz. B. R. Goodrick's case.

8. *Protection* for the husband shall serve also for the wife. Co. Litt. 130. b. (c). Jenk. 26. pl. 50. S. P. and if the

protection is repealed and declared void, this turns to the default both of husband and wife.—Jenk. 93. pl. 31. S. P.—Jenk. 80. pl. 57. S. P.

9. A. devised the residue of his estate to B. C. and D. and the wife of D. equally to be divided. D. and his wife shall take but as one person. Vern. 233. pl. 228. Pasch. 13 Car. 2. Bricker v. Whalley.

10. A. B. hath 3 nieces, one of them takes husband. A. B. devises a legacy to the husband and wife, and the other nieces equally; the question in chancery was, whether there should be three parts or four. It was argued, that being tenants in common, there should be four parts, as likewise that so it should be adjudged by the civil law, and that in chancery they govern legacies by the rule of the civil law, unless where it directly contradicts the common law; but it was ruled by Ld. K. North, that there should be but three parts, and that husband and wife should take but as one person according to the rule of the common law, and the rather, for that the legacy here was given in respect of the wife, and not of the husband also. Skin. 182. in chancery, pl. 9. Pasch. 36 Car. 2. B. R. Anon.

11. Husband and wife were sued, and afterwards in the pleadings it was said, *venerunt partes predictæ per attornatos suos predictos*; this was held naught upon a writ of error, because they are but one person in law. 3 Salk. 62. pl. 1. Pasch. 12 W. 3. B. R. Maddox v. Winne.

(N. a) What Act by the one to the other is good.

1. THE custom of York is, that a feme covert may take land purchased by her baron, of the gift of her baron. Br. Customs, pl. 56. cites 12 H. and Fitzh. Prescription 61.

S. P. Br. De-
vise, pl. 18.
cites 31 Aff.

3. ———
Litt. f. 168.
S. P. as to

lands of tenure in burgage, where the custom was to devise.

2. A devise by the baron to his feme is good, though they are one and the same person in law; for the devise *does not take effect till after the death of the baron*, and then they are not one person. Br. Devise, pl. 34. cites 3 E. 3. It. Not.

3. Gift made by the king to the queen by charter is good. Br. Corporations, pl. 45. cites 49 Aff. 8.

Br. Attor-
ney, pl. 91.
S. P. cites

Paſch. 13 E. 3. Fitz. tit. Attorney, 73. — A feme may be attorney to deliver seisin to her husband, and the husband to the wife. Co. Litt. 52. a.

4. A feme covert may be attorney for her husband. F. N. B. 27. (C)

Co. Litt.
187. b. at
the bottom,
S. P. tho'
they are
but one
person in
law, so as
neither of
them give
any estate
or interest to the other.

5. In diverse cases a man may be a means to make a thing pass unto his wife, which shall not immediately pass from him; and therefore if a man *infeoffs a married woman, and makes a letter of attorney unto the husband to make livery of seisin according to the deed*, and he makes livery of seisin accordingly, it is a good feoffment; for the husband is but a means to convey the freehold to the wife; for by this act done no freehold doth pass from the person, &c. Perk. f. 196.

6. In debt, per Fisher, if a man be bound to infeoff a woman by a certain day, and before the day he marries her, he may make lease for a month to a stranger, the remainder to his feme, and it is a good performance. Quære. Br. Feoffment de Terre, pl. 38: cites 4 H. 7. 4.

7. Grant was made to the queen by the king of certain land for term of life; and so see that the queen is a person exempt, and may take of her own baron by grant of him. Br. Patents, pl. 55. cites 7 H. 7. 7.

S. P. be-
cause she is
but an in-
strument for
others, and
the estate
passes from
the devisor.

8. Note that it was adjudged, that a feme covert executrix may make a sale of the land to her own baron, and this is a good bargain; and because the feoffees would not make a feoffment accordingly, therefore they were committed to the Fleet. Br. Executor, pl. 175. cites 10 H. 7. 20.

Co. Litt. 187. b. — There is a diversity between a naked power and a power that flows from an interest. When a bare power is given to a feme by will to sell lands, though she marry she may sell, and may sell the lands to her husband, because it was not created by herself out of any interest of her own; but where a feme, on a settlement of her own estate, reserves a power which flows from an interest, that power ought to be executed by the feme sole, and if by the baron and feme, it is not good. Chan. Cases, 18. Hill. 14 & 15 Car. 2. The Marquis of Antrim v. Duke of Buckingham. — 2 Freem. Rep. 168. pl. 214. S. C. in much the same words. — For she on the matter nominates the party, and he takes by the will; per Winch J. 2 Brownl. 194.

If the ba-
ron be
bound to
pay his wife
money, that
is good. Co. Litt. 207. a.

9. Actus simplices a man may do to his wife, as to pay money to her, and the like. Arg. 2 Bulst. 291. in Dockwray's case, cites 27 H. 8. 15.

10. Debt upon an obligation indorsed for performance of covenants, of which one was, among others, that the defendant should

should pay annually 7l. to J. his feme on such a feast, and issue found against him; and it was pleaded in arrest of judgment, that a man cannot pay to his own feme. And per Fitzherbert and Shelly J. clearly, this may be as well as a man may find his feme living and vesture; but he cannot give or infeoff his feme. Br. Conditions, pl. 8. cites 27 H. 8. 27.

* 11. The husband leases land to A. for life, the remainder to his own wife in tail. This is not good, because a gift immediate to his own wife is not good; and if he in remainder is not capable at the time of the livery, he never shall be. Br. Lect. Stat. Limit. 78.

12. The husband may surrender a copyhold to the use of his wife, because it is not done immediately to her, but to the lord of the manor to her use, and by his admittance of the feme, according to the surrender. 4 Rep. 29. b. pl. 18. Mich. 27 & 28 Eliz. the 4th resolution in case of Bunting v. Lepingwell.

13. A feme covert cannot take any thing of the gift of her husband. Co. Litt. 3. a. at the top.

She cannot take by an immediate

conveyance from her baron; but it ought always to suppose the gift and demise to be from the feoffees. Arg. Cro. E. 722. pl. 52. Mich. 41 & 42 Ellis.

By act executed, a man cannot convey to his wife. Arg. Roll. Rep. 59.—2 Vern. 385. Moyle v. Gyles.

By no conveyance at the common law a man could, during the coverture, either in possession, reversion, or remainder, limit an estate to his wife; but a man may by his deed covenant with others to stand seised to the use of his wife, or make a feoffment or other conveyance to the use of his wife; and now the estate is executed to such uses by the statute of 27 H. 8. for an use is but a trust and confidence, which by such a mean might be limited by the husband to the wife; but a man cannot covenant with his wife to stand seised to her use, because he cannot covenant with her, for the reason which Littleton here yieldeth. Co. Litt. 112. a.

If a man be bound with a condition to infeoff his wife, the condition is void, and against law, because it is against a maxim in law, and yet the bond is good. Co. Litt. 206. b.

14. If a feme disseisors makes a feoffment in fee to the use of A. for life, and after of herself in tail, and the remainder to the use of B. in fee, and then takes husband the disseisee, and he releases to her all his right, this shall enure to B. and to his own wife also; for by Littleton's rule it must accrue to all in the remainder. Co. Litt. 297. b.

15. If cesty que use had devised that his wife should sell his land, and made her executrix, and died, and she took another husband, she might sell the land to her husband; for she did it in auter droit, and her husband should be in by the devisior. Co. Litt. 112. a. at the bottom.

S. P. Went. Off. Executors, 207. but says he marvels at it, yet volenti non fit

injuria.—Arg. Godb. 15. cites 3 E. 3. Br. Devise, 43.

16. Though the last will does not take effect till after his decease, yet if a feme covert be seised of lands in fee, she cannot devise the same to her husband, because at the making her will she had no power (being sub potestate viri) to devise the same, and the law intends it should be done by coercion of her husband. Co. Litt. 113. b.

† She may devise her copyhold lands to her husband with or without his consent, if

the custom of the manor be so. Mo. 123. pl. 268. Pasch. 25 Eliz. Anon. Adjudged as unreasonable custom, because it cannot have a reasonable commencement; for the wife being always sub potestate viri, it shall be intended that she did it by coercion of her husband. Godb. 143. pl. 173.

pl. 178. 33 Eliz. C. B. Skipwith v. Sheffield. — And though it was urged that the custom might be good, because she might be examined by the steward of the court, as the manner is upon a fine to be examined by the judge, yet the court said nothing to it. Ibid. 144.

17. A man cannot *covenant with his wife*. Co. Litt. 112. a.

18. *Lessee is restrained from aliening, but only to his wife*, and if no wife, then to a younger brother. If *lessee makes estate to his wife* for her life, and the *residue* of the term to his brother, this had been void as to the wife, because he cannot make alienation to his wife; and this ought to be construed to be done by such alienation as he may make to her, and that must be by will, and cannot be otherwise, and good presently to the younger brother; per Coke Ch. J. 2 Bulst. 212. Mich. 12 Jac. Fox v. Whitchcott.

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4 Rep. 29.

b. Bunting

v. Leping-

well. — Jac.

Roll. Rep. 138. Arg. — Co. Litt. 112. a. 3. P.

A man cannot make a good promise to his wife in law, tho' he may to a stranger for her. 2 Lev. 148. Mich. 27 Car. 2. B. R. in case of Clerk v. Nettlethip.

20. A. after marriage, *promised his wife to pay her 100l. and since they are separated*. The court conceived such promise to be utterly void in law, and would not relieve the plaintiff. Chan. Rep. 60. 8 Car. 1. Stoit v. Ayloff.

21. K. the plaintiff's late husband, *purchased a walk in a chase, and took the patent to himself and his wife, and one B. for their lives, and the life of the longest liver of them. K. died, and made the defendant his executor*; the plaintiff's bill was to have the benefit of this purchase, and to have the patent delivered to her. The defendant by answer set forth, that *K. died greatly indebted, and had not left sufficient assets for payment thereof*. Per cur. it shall be presumed to be intended as an advancement and provision for the wife; the wife cannot be a trustee for the husband; and therefore decreed that the plaintiff should enjoy the patent during her life, and after her decease, in case B. should survive her, to be a trust for the executor of the husband, and applied towards the payment of his debts. 2 Vern. 67, 68. pl. 62. Trin. 1688. Kingdome v. Bridges.

22. Wife cannot be examined as a *witness against her husband*. 2 Vern. 79. pl. 74. Trin. 1688. Cole v. Grey & Ux'.

2 Vern. 385.

pl. 352. S. C.

23. One *jointenant made a deed of gift to his wife of his moiety to sever the jointure and make a provision for her, he being taken sick on a journey*. It being void in law, as being made to her, and being voluntary and without consideration, equity would not make it good. Ch. Prec. 124. pl. 108. Mich. 1700. Moyse v. Gyles.

24. *She may take by his will*, though she cannot take by any conveyance at common law; for the will not taking effect, in point of transference of an interest; after the husband's death, she is in nature of a stranger, and the land will pass to her; per Trevor

vor Ch. J. 11 Mod. 156. Hill. 6 Ann. C. B. in case of Archer v. Bokenham.

25. *Mortgagee made M. the wife of B. executrix*, and residuary legatee for her sole and separate use; *B. gave her a note under his hand* that she should have benefit of the mortgage. The note gives the wife good right both to the principal and to the interest due on the mortgage, and is grounded on natural justice. 2 Vern. 659. pl. 585. Trin. 1710. Harvey v. Harvey.

Wms.'s Rep.
125. Trin.
1710. S. C.

26. Baron *on his death-bed delivered to his wife a purse of 100 guineas, and bid her apply it to no other use but her own; and also drew a bill upon a goldsmith to pay 100l. to his wife to buy her mourning*, and to maintain her till her jointure should become due, and about 17 days after died. The master of the rolls held the gift of the purse to be good as *donatio causa mortis*, ut *res magis valeat, &c.* because otherwise a man cannot give to his own wife; and said this was the nature of a legacy to his wife; and as to the bill drawn on the goldsmith, he held the same good, and that it should operate as an appointment; but that if she had received it in her husband's life, it might be liable to some dispute, but that he apprehended it amounted to a direction to his executors, that the 100l. should be appropriated to his wife's use; and inclined to think that had she received it in his life-time she should have kept it, and being for mourning it might operate like a direction given touching his funeral, which ought to be observed, though not in the will, and these gifts being but small in comparison of the personal estate, and so was only an instance of his care, he decreed accordingly. Wms.'s Rep. 441. Trin. 1718. Lawton v. Lawton.

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(O. a) Disputes Inter se.

1. A Feme is not a felon by taking the goods of her baron, because she has colour. Br. Corone, pl. 141. (142) cites 5 H. 7. 18.

Hawk Pl. 6.
93. cap. 33.
f. 19. cites
S. C.

2. A woman before her marriage with the baron, had a decree for 600l. per ann. and it was agreed before marriage between them by parol, that she should have the sole disposal thereof, and accordingly before marriage, she by deed assigned the benefit of the decree to one C. who after the marriage, together with the wife, released it to the defendant, it was had against; but per Coventry Ld. K. and 2 J. this verbal agreement was to subvert both the ground of law, and the right vested in the baron by the inter-marriage, and therefore if such agreement is not settled by some legal assurance to make it binding in law, it is not fit to maintain it in a court of equity. N. Ch. R. 15. 26 July, 7 Car. 1. Suffolk (earl) v. Greenville.

3 Chan.
Rep. 89.
16 June,
17 Car. 1.
S. C. re-
ported much
in the same
manner.—2
Freem. Rep.
146. pl. 191.
16 June, 7
Car. 1. S. C.
reported
with very
little diffe-
rence.

3. In action on the case for scandalous words brought against the defendant, she pleaded in bar by attorney, that ante diem of exhibiting the bill, viz. 1 die Julii, 12 Car. 2. the plaintiff married her the defendant; and upon demurrer to this plea, she had judg-

N 3

ment,

ment, though it was pleaded in bar. Raym. 395. Trin. 32 Car. 2. B. R. Walfal v. Mary Allen.

See tit. Ne
exces Reg-
num, pl. 7.
in the notes
there.

4. A motion was made for *ne exeat regnum*, the wife having sued him in the ecclesiastical court for alimony, and it was suspected that he would go beyond sea to avoid the sentence; the writ was granted in aid to the ecclesiastical court, and also a *supplicavit de bono gestu*, the court being informed that he used his wife very ill. 2 Vent. 345. Trin. 32 Car. 2. in Canc. Sir Jerome Smithson's case.

5. Though a man cannot have a bill against his wife for discovery of his own estate, yet where before marriage she enters into articles concerning her own estate, she has made herself as a separate person from her husband; and she was ordered to answer in a week. Ch. Prec. 24. pl. 26. Pasch. 1691. Sir R. Brooks v. Lady Brooks.

6. A feme was indicted by her husband for poisoning his cows with bruised glass put into their grains, and she was admitted in forma pauperis, though the court said that the husband could not convict her. 6 Mod. 88. Mich. 2 Ann. B. R. Anon.

But none
can bring a
bill in the
name of a feme
covert as her
prochein amy
without her
consent, and
if such bill be
brought, it will
be dismissed
on her affidavit.
Chan. Prec. 176.
pl. 262. Mich.
1713. Andrews
v. Cradock. —
Gillb. Equ. Rep.
36. S. C. in the
same words. The
case was, a bill
was brought by
Andrews as prochein
amy to the wife
of the defendant
Cradock, against
her husband and
his father, who
was executor of
her grandfather,
in trust for her,
to have an account
of the personal
estate of her
grandfather, and
to have a settle-
ment made upon
her and the issue
of the marriage,
&c. Mr. Vernon
for the defendant;
this bill being
brought by the
father of the wife
against her consent,
and disavowed
by her personally
in court, ought
to be dismissed;
it is true, a feme
covert may sue
in this court by
prochein amy as
a feme sole, but
no person can
bring a bill in
the name of a
feme covert without
her consent, as
it may be done
in the case of an
infant. There is
no instance of a
suit in this court
by a wife against
her husband to
have a settlement
made by her husband
upon her and her
children, but if a
feme covert is
intituled to a
trust either of a
real or personal
estate, and the
husband brings
a bill in this court
to have the benefit
of the trust, in
such a case the
court, before they
will give the husband
any remedy, will
take care of a
provision for the
wife and children;
for since the husband
stands in need of
the aid of this court
to get in his wife's
fortune, it is reasonable
that the court should
compel the husband
to make a provision
for her; for he that
will have equity,
ought to do equity;
but where the husband
has a legal title
and remedy to
recover his wife's
portion, this court
will not take away
his legal remedy,
or hinder the husband
from suing at law
in right of his wife
by an injunction
till he makes a
provision for his
wife. Per Harcourt
C. the wife disowns
the suit, and it is
not reasonable a
third person should
bring a bill in her
name against the
husband without
her consent, and
when she personally
appears in court,
and disavows the
suit; this tends to
the sowing division
between husband
and wife, and
breeding disputes
and quarrels in
families. This is
an appeal from a
decree of the master
of the rolls, who
ordered the defendants
to account, &c.
therefore the decree
must be reversed,
except as to bringing
the writings and
deeds relating to
the wife's real estate
before the master,
to remain there
till further order
of the court. MS.
Rep. Trin. 13
Ann. in Canc.
Andrews v. Cradock
& al'.

7. A feme covert may sue her husband by prochein amy. Ch. Prec. 275. pl. 223. Hill. 1708. Kirk v. Clark.

8. A. bequeathed the residue of her personal estate, being about the value of 2000l. in S. S. stock, to a feme covert, but by her maiden name, not knowing her to be married, and made her executrix. The husband agreed with a friend of the wife's to settle it in trustees, whereof she to name one, and the husband the other, and to go to the survivor. A transfer is made by them accordingly. Afterwards a variation was proposed by the wife's friends, and to limit the uses, after the death of the survivor, to the issue of the marriage, and for want of issue to the administrators of the wife. A declaration was drawn, but was objected to by the husband, who

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who desired that the trust might be for them and the survivor, and after to the issue, and then the survivor to take the whole; but before such declaration was executed, the husband died intestate without issue. Ld. C. Talbot taking notice of making the wife executrix, and residuary legatee, by her maiden name, not knowing her to be married at the time, thought it would be hard to say this 2000l. did absolutely vest in the husband, notwithstanding the case 3 Lev. 403. which had been cited, especially as by being executrix she is chargeable with debts; but, however, as he had it singly through his wife, and had made no settlement upon her, it was reasonable it should be settled upon her; that the agreement was compleat on both sides, and the subsequent transfer must be taken in pursuance of that agreement, and was of opinion, that upon her surviving, the stock was become her sole and absolute property; and so decreed the defendants, the trustees, to be trustees for the wife in her own right. Cases in Equ. in Ld. Talbot's Time, 171. Hill. 1735. Fort v. Fort & Blomfield.

(P. a) Acts or Agreements of the Feme before Marriage in Fraud of the Husband, or in Derogation of the Rights or Expectation of the Baron, avoided.

1. THE plaintiff's wife before marriage conveyed away her estate to the defendant, being her son, and after the defendant conveyed the same to his children, being infants, because (as the court conceived) it was passed without any consideration; it was decreed for the plaintiff against the defendant and the infants, in 32 & 33 Eliz. li. B. fo. 430. 454. & 484. Toth. 162. Povy v. Peart.

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If a widow conveys her personal estate to trustees, subject to such uses as she should by deed attested by 2 witnesses af-

ter marriage appoint, and for want of such appointment, to her children by the * first marriage; if she afterwards marries, and the second husband has no notice of such deed, it will be void and fraudulent as against him; per Ld. C. King. Trin. 1729. 2 Wms.'s Rep. 533. 535. in case of Poulson v. Wellington.

If a woman privately before marriage gives a bond without any consideration to a third person for 1000l. and marries one who knows nothing of this bond, surely equity would relieve against such bond. 2 Wms.'s Rep. 360. per Ld. C. King, who put this case. Trin. 1726. in case of Cotton v. King.

But where a widow conveyed lands in trust for herself during her widowhood, and after in trust for some of her children, and did this in a public manner, and before any treaty for a second marriage, and also covenanted to transfer 1000l. S. S. stock, of which she was possessed, to the like uses, reserving over and above a handsome maintenance in lands jointured upon her, and in ready money, and afterwards married one that had no estate, and would have set aside the conveyance and covenant as fraudulent, yet Ld. C. King held the same good, and not avoidable by him, and that the covenant to transfer, though no actual assignment was made, should bind him, and dismissed the bill. 2 Wms.'s Rep. 606. Trin. 1732. King v. Cotton.

2. A widow having an estate devised to her for 400 years by her former husband, and being about to marry Sir P. N. she made a settlement thereof, in order to prevent such after-husband from hav-

ing the same, and Sir P. N. having intimation that she intended to make such settlement, but not knowing of its being made, broke off the treaty of marriage, which was afterwards brought on again by some friends of the widow, and Sir P. accordingly married her upon hopes and in confidence of having the interest she had in the said estate, and without which he would not have married her, the court decreed the said deed to be absolutely set aside, and no use to be made thereof against Sir P. N. or any claiming under him. 2 Chan. Rep. 81. 24 Car. 2, Howard v. Hooker.

3. A recognizance entered into by the wife the day before marriage was set aside, and a perpetual injunction granted, though one witness deposed the husband's consent to the drawing it, but that witness had an assignment of it to himself. 2 Chan. Rep. 79. 24 Car. 2. Lance v. Norman.

4. It was held clearly per cur. and admitted by both parties, that if a feme, with the privity of the husband before marriage conveys a term for years in trust for herself, that is clearly out of the husband's power, and he can neither dispose of nor release the interest of the wife, and if the feme should join in the grant, it would not amend the case. But the court seemed to incline, that if a feme does secretly, without the knowledge of her husband, before marriage, convey a term for years in trust for herself, that this shall be in the power of the husband, so as he may either grant or release the interest of the wife. 2 Freem. Rep. 29. pl. 2. Hill, 1677. in Draper's case.

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Vern. 18. S. C. but says the question was upon an assignment without the knowledge of the intended husband. Against the disposal were cited the case of EDMOND'S v. BARRINGTON and SIR JOHN DACCOME'S CASE, and SANDY'S CASE. It was admitted on the other side,

5. M. a feme possessed of a long term, being about to marry A. who was indebted to J. S. 400l. by agreement of A. and J. S. makes a lease to J. S. for 10 years, to secure payment of the 400l. the lands being reckoned 80l. a year, and then by indenture sealed in the presence of A. (the intended husband) assigns the residue of the term in trust to be at her disposal, whether sole or covert, (but there were no other words whereby to exclude the husband) and brought in money, &c. to the value of 600l. After marriage other creditors of A. got judgment against him, and on a fi. fa. the sheriff sold the residue of the term; and on a bill in chancery it was decreed for the vendees against the trustees of M. because the like point had been decreed so in SIR EDWARD TURNER'S CASE, the lord chancellor holding it not fit a decree should be one way in parliament and another way in chancery, but declared it against his own opinion, because widows in most cases cannot otherwise provide for themselves; and the husband in this case forsook his wife, and refused reconciliation, and allowed her nothing, &c. yet decreed ut supra. 2 Chan. Cases, 73. Mich. 33 Car. 2. Pitt v. Hunt.

that there had been such a resolution, but said * that the law is now changed by the resolution of the lords in SIR EDWARD TURNER'S CASE, which was exactly the same with this, and was by all the lords in parliament resolved, that the husband might dispose of the trust of the term. The Ld. Chancellor seemed to wonder at that resolution, and said it could not amount to an act of parliament to change the law; and although at first there possibly was no great reason for those resolutions, that the husband could not dispose of a trust for the feme made without his privity before marriage, yet the law being so settled, people made provisions for their children according to what the law was then taken to be, and now those provisions are defeated by this new resolution; so that now it is almost impossible for

a man

a man so to provide for his child, but it shall be subject to the disposal of an extravagant husband; and he recommended the saying of Ch. B. Walter, viz. It is no matter what the law is, so it be known what it is. But at last he said he must be concluded by the lord's judgment, and so he decreed it according to Ch. Baron Turner's case, saying, that there must not be one sort of equity above stairs in the house of lords, and another below stairs in chancery; and he thought, that from henceforth it would not serve a turn to have the husband's consent or privity to an assignment of a term in trust for the feme before marriage, unless he was likewise made a party to the assignment.——2 Freem. Rep. 78. pl. 86. Hunt v. Pitt, S. C. and lord chancellor said, that this reversal in the house of lords was contrary to his opinion, and since the lords had so done, they had altered the law in that particular, and therefore declared his opinion to be, that the husband had power over the term. But if the husband be made a party, or does make an agreement not to dispose of it, there it shall not be in his power to dispose of it.——S. C. of Turner cited, and said that the judgment given by the Ld. Nottingham to the contrary, was said by himself to have been on a mistake; for that the wife having married a former husband, she before the marriage made such agreement, but no such provision was made when she married Sir Edward Turner, but he thinking such provision had been made, decreed the sale void, but it was reversed by his own approbation, as it seems, in Dom. Proc. 3 Ch. R. 223. Patch. 1688. in case of Sanders v. Page.

6. A woman before marriage agreed with her husband, that she should have power to act as a feme sole notwithstanding that marriage. The husband died, and she married another husband who was not privy to the settlement on the former marriage. It was decreed, that the second husband should not be bound by that settlement on the former marriage. 2 Vern. 17, 18. in pl. 11. Hill. 1686. cites it as a case about 4 years since of Edmonds v. Dennington,

(Q. a) What Agreements, &c. are extinguished by the Marriage.

1. **I**N detinue by feme it is a good plea, that after the bailment she married the bailee; for by this the bailment is discharged; per Fineux Ch. J. and he ought to declare upon a trover. Br. Barre, pl. 53. cites 21 H. 7. 29.

2. A. makes an obligation to B. to the use of C.—A. seals it. A. B. and C. being, at the time of sealing it, at one place, A. puts the obligation into the hands of C. and says, this will serve; this is a good delivery; and though C. afterwards marries A. yet the obligation remains, and is neither extinguished or suspended. Adjudged and affirmed in error. Jenk. 221. pl. 75.

tion, that it is to his use, his release shall be of no force; for in the principal case the marriage does not extinguish it; but if the obligation had named cestui que use, it had been otherwise. Jenk. 222. pl. 75.—D. 192. b. pl. 26. Mich. 2 & 3 Eliz. Parker v. Gibson, administrator of reman, S. C.

This case proves, that where an obligation is made to the use of another, without saying in the obligation,

3. In debt on a bond for performance of covenants in an indenture made by the baron before marriage, to pay legacies given by the feme in a will made by her before marriage; though it was objected, that the marriage continuing till her death, the will and devise was void. But adjudged for the plaintiff; for though it was not a will to all intents, * yet it referred to that which did bear the name of a will, and though it was not a will in fact, it is not material. Cro. E. 27. pl. 9. Patch. 26 Eliz. C. B. Eston v. Wood.

mit her to make a will, and to dispose in legacies not exceeding 50l. and pay and perform what she appointed,

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Debt upon bond conditioned, that whereas the obligor had taken A. S. to wife, who was possessed of several goods, if he should per-

pointed, not exceeding 50l. that then, &c. The defendant pleaded, that she did not make a will; whereupon issue was joined, and found that she made a will, and disposed of legacies not exceeding 50l. but that she was covert at that time; adjudged for the plaintiff; for though she, being covert, could not make a will by law, or dispose of any goods without her husband's consent, yet *this was a will within the intent of the condition*, and it is but her appointment which he is bound to perform, and judgment nisi. Cro. C. 219. pl. 5. Trin. 7 Car. B. R. Marriot v. Kinsman.

Where an agreement is between baron and feme before marriage, that the wife may by will dispose of part of her estate, or for a thing which is future to the marriage, such an agreement is not dissolved by the marriage; but where an agreement is to have execution during the coverture, there the marriage extinguishes such agreement; per Hale Ch. B. Chan. Cases, 118. Mich. 12 Car. 2. in case of Pridgeon v. Pridgeon.

Hob. 216.
pl. 280. S. C.
accordingly.
— Noy.
26. S. C. says,
judgment
was ready to
be given for
the plaintiff,
but they

4. A. promised M. a feme sole, that if she would marry him, he would leave her worth 100l. Hobart Ch. J. said, that the promise is extinguished by the marriage, but Winch and Hutton J. e contra; for that the law will not work a release contrary to the intent of the parties, and that the marriage which was the cause does not destroy that which itself creates. Hutt. 17, 18. Hill. 15 Jac. Smith v. Stafford.

compounded in court.—Brownl. r8, 19. S. C. 3 judges held for the plaintiff, and one for the defendant.—Godb. 271. pl. 379. S. C. says, that Hobart and Warburton were against Winch and Hutton.—S. C. cited Cro. J. 571. pl. 11. by the reporter, and says, that three justices held that the action well lay, but that Hobart held e contra.—Litt. Rep. 32. cites S. C. as resolved, that the intermarriage was only a suspension of the promise.—Het. 12. cites S. C. but seems only a translation of Litt. Rep.—S. C. cited by Glyn Ch. J. 2 Sid. 59.—Freem. Rep. 512, 513. pl. 687. Hill. 1699. B. R. in case of Gage v. Acton, Holt Ch. J. admitted, that in such case the promise is not released, because it cannot possibly happen during the coverture, and this is like a condition precedent, so that if a man declares upon such a promise, he must aver that the husband is dead, and that she survived him, &c. but it is not so in case of a bond with a condition, for there the party declares upon the bond only, without taking notice of the condition. Cites 5 Co. 70. Hoe's case. But a contingency which may or may not happen during the time of the marriage, may be released by the husband; as where a term for years is devised to A. for life, and after his decease to the use of A. there A. the husband may release, because the contingency may happen in the life-time of the husband.—S. C. cited by Holt Ch. J. Ld. Raym. Rep. 521, 522, 523. and says, that Noy in his report of the case of Smith v. Stafford reports, that it was said by Warburton, that it would be otherwise in the case of a bond, and that the whole court agreed to it; and nevertheless, they resolved otherwise in case of a promise, which proves that it must necessarily be, that they grounded themselves upon the difference between a bond and a promise, or otherwise their resolution will be contradictory; and one must consider the whole case, and not disallow the distinction, and agree to the resolution, for that would be to agree to the conclusion, and deny the premises.

5. A feme sole possessed of a term, conveyed the same over in trust for her, and covenanted with F. S. whom she did intend to marry, that he should not meddle with it, and for that purpose took a bond of him. They intermarried; he may intermeddle with it, but he shall not have it, and by equity he cannot assign it, by reason of the covenant before marriage. Mar. 88. pl. 141, Pasch. 17 Car. Anon.

B. C. cited
by Holt Ch.
J. Ld.
Raym. Rep.
522.

6. A. intending to marry such a woman, covenanted, that if she would marry him, and should survive, he would give 300l. to her next of kin, and gave a bond to a third person for the performance of this covenant. In debt for this 300l. it was argued, that though this was a future covenant, which could not be broken in the life-time of the parties, yet it might be released; and if so, then the marriage was a release in law, and so the debt extinct; but the court inclined the judgment ought to be for the plaintiff, and ruled it to be moved at another time. 2 Sid. 58. Hill. 1657. B. R. Luprat v. Hoblin.

7. A. bca

7. A. before marriage with M. agrees with M. by deed in writing, that she, or such as she should appoint, should during the coverture receive and dispose of the rents of her jointure, by a former husband, as * she pleased. Per cur. the *aforsaid agreement with the feme herself* before marriage, was by the marriage *extinguished*. Chan. Cases, 21. Pasch. 15 Car. 2. Darcy v. Chute & Haughton.

3 Ch. Rep. 6. S. C.—
N. Ch. Rep. 17. S. C.
and letter of attorney made by her before marriage is void.
—3 Ch.

Rep. 91.—S. C. cited 2 Wms.'s Rep. 243. Arg. But the principal case there being, that before the marriage the *fem: gave bond to her intended husband to convey her lands to him and his heirs*; but though the marriage took effect she died without issue, without conveying the same; and it being objected that the bond was suspended, and so extinguished by the marriage, Ld. C. Macclesfield held it unreasonable that the intermarriage, upon which alone the bond was to take effect, should itself be a destruction of the bond; and that the foundation of that notion is, that in law the husband and wife being one person, he cannot sue his wife on this agreement; whereas in equity it is constant experience that the husband may sue the wife, and the wife the husband, and he might sue her in this case upon this very agreement. 2 Wms.'s Rep. 244. Mich. 1724. Cannel v. Buckle.

8. The baron before marriage *articled with the feme to make a settlement of certain lands, before the marriage should be solemnized*; but they *intermarried before the settlement*. Then the baron died; and on a bill by the widow for an execution of the articles, it was decreed against the heir at law of the baron; though objected, that marrying before the execution of the settlement was a waiver of the articles, and the benefit of them; and she being the only party with whom they were made, her marriage with the other party before performance was a release in law. 2 Vent. 343. Mich. 30 Car. 2. Haymer v. Haymer.

9. Husband covenants with his intended wife, that she should have *power to dispose of 300l. of her estate*, notwithstanding the intermarriage. Whether this covenant is discharged by the marriage? The court inclined to dismiss the bill brought by the husband for the money; but it was urged that the wife consented, and so put off for her to come and signify her consent in court. Vern. 408, pl. 383. Mich. 1686. Furfor v. Penton.

10. Lands limited to A. in *trust for a feme covert*, and that A. should receive the rent, and apply them as the feme, whether sole or covert, should appoint. Per cur. this is *only a trust*, and not an use executed by the statute. Vern. 415. pl. 393. Mich. 1686. Nevil v. Saunders.

11. *Settlement by the feme before marriage*, for her separate use, *without the privity of the baron*. Ld. Chancellor decreed, that the husband should have the possession of the estate, and that the trustees should make a conveyance of the lands to the six clerks, that it might be subject to the order of the court. 2 Vern. 17. pl. 11. Hill. 1686. Carlton and Lady Dayrill his wife v. Earl of Dorset.

12. A feme sole, being *executrix* and residuary legatee of J. S. *lends 100l. to A. and B. for which she takes a note in her own name, and a bond in a trustee's name*, and afterwards *marries B.* one of the obligors. B. dies. On a bill against A. he insisted, that the marriage with B. was an extinguishment of the bond, as well as if it had been made in her own name; sed non allocatur. 2 Vern. 290. pl. 280. Pasch. 1693. Cotton v. Cotton.

Ch. Prec. 41. S. C.

Skin. 409,
410. pl. 5.
Heading v.
Davis, S. C.
and though
the case of
Smith v.
Stafford,
Hob. 216.
was cited,
yet Holt Ch.
J. said, this
case had
been shaken.
Vern. 409.
Arg. cites
Hob. 216.
the case of
Smith v.
Stafford,

13. Debt on bond for performance of covenants, in certain articles made between the defendant and his wife before marriage, (*viz. that the man should bring 50l. and the woman 25l. into a flock, into the hands of a 3d person, to be so and so disposed of.*) It was argued, that the promise was suspended, and consequently extinguished by the marriage. But per Holt Ch. J. though the articles are suspended by the marriage, yet it was the intent of the parties that the things should be performed, though the articles are gone; and the bond is not void, being made to a 3d person. And Eyres J. cited 1 Inst. 206. and they said the money was to be brought in presently, so that though the marriage had been a release, yet they should plead performance to that time. *Judicium pro quer' nisi.* Comb. 242. Hill. 5 W. & M. B. R. Gibbons v. Davies.

where, according to the book, a promise by the husband to the wife to *leave her 500l. at his death was discharged by the intermarriage; but says, note that the case of Clarke v. Thompson, Cro. J. 571. is directly contrary, and therefore the case of Smith and Stafford is cited; and 3 judges were of opinion, that the promise was not discharged by the intermarriage, and only my Ld. Hobart was of the contrary opinion. [This remark on the case of Smith v. Stafford, is in a note at the end of the case of Clark v. Thompson, Cro. J. 571. pl. 11.] — a Sid. 59. Hill. 1657. it was said by Glyn Ch. J. that the opinion of Hobart in Smith and Stafford's case, seems contrary to the judgment of the same case, and contrary to Heil. Rep. 12. for in favour of common assurances and continual practice it would seem very dangerous to adjudge this debt extinguished.

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14. Upon a treaty of marriage the man gave a bond to the woman, conditioned that if he did permit her to dispose of 100l. then the bond should be void. Afterwards the marriage took effect, so that the bond became void, yet this was held to be a good agreement; and the court decreed that the husband should give bond to trustees with the same condition. It was held, that a bill may be exhibited by her prochein amy; or if trustees exhibit a bill for or on her behalf, it is good either way. 2 Freem. Rep. 205. pl. 279. Mich. 1695. Drake v. Storr.

15. Bond by a man to a woman before their intermarriage, that in case they intermarried, and the wife survived, and the husband left her 1000l. then to be void. Per Holt Ch. J. the bond is extinguished by the marriage. Per Gould and Turton J. it is only suspended, because it would subvert the marriage-agreement, and the rather because it was not payable during the coverture, but it was a debt on contingency; so that if the wife dum sola had released all demands, the debt had not been extinguished. 1 Salk. 325. Hill. 11 W. 3. B. R. Gage or Gray v. Aeton,

Carth. 511.
Hill. 11 W.
3. Gage v.
Aeton, S. C.
adjudged ac-
cordingly by
2 judges,
contra Holt;
whereupon a
writ of error
was brought
in cam.
scacc. but
the plaintiff
in error, perceiving the court inclined to affirm the judgment, did not proceed. — 13 Mod. 288. S. C. argued at bar and at bench, and says that the case went afterwards into chancery, where relief was given, the bond being considered as a marriage-agreement. — Freem. Rep. 512. pl. 687. S. C. adjournatur. — Ibid. 515. pl. 691. S. C. adjudged by 2 judges, contra Holt Ch. J. — Ld. Raym. Rep. 515. S. C. with the arguments of the judges, and adjudged that the bond was not extinguished by the marriage, by the 2 judges contra Holt Ch. J. — a Vern. 480. pl. 436. Hill. 1704. Aeton v. Pierce & Saxby & al' S. C. and decreed the bond good in equity, though extinguished at law, and that it should bind the real assets; and decreed that the redeem a mortgage as well of copyhold as freehold, included in the same security, and to hold over. — Chan. Proc. 237. pl. 199. Aeton v. Aeton, S. C. decreed accordingly. — Freem. Rep. 512. pl. 687. Hill. 1699. B. R. and ibid. 515. pl. 691. B. R. the S. C. was held by Gould and Turton J. that the bond is not discharged, but Holt Ch. J. & contra.

(R. a) Will made by Feme Covert. Good in what Cases.

1. A Feme covert devises goods by her testament, and the baron *delivers the goods to the executors of the wife*, as was proved by verdict; the court, upon this presumption, adjudged that the baron gave precedent assent to the making the will. Arg. Mo. 192. pl. 341. cites 5 E. 2.

2. Quære, if a feme covert may *devise to her own baron*; for it may be by coercion of the baron. Br. Devise, pl. 18. cites 31 Aff. 3.

died. This devise is void, per cur. for the law presumes that this devise is by coercion of the baron. Ibid. pl. 32. cites 6 E. 3. It. Notingh.——S. P. ibid. pl. 34. cites 3 E. 3. It. Not.

3. A feme hath feoffees to her use, and takes baron, and *makes her will that the feoffees shall infeoff her baron, and dies*. The baron shall not have a subpoena against the feoffees; for the will of the feme covert is void; by all except Tremayle. Br. Conscience, &c. pl. 28. cites 18 E. 4. 11.

4. Marriage is a *countermend* of a will made by a feme sole. [165] And. 181. pl. 217.

4 Rep. 60. Mich. 30 & 31 Eliz. C. B. Forfe v. Hembling. Anon. but S. C. adjudged that the will is void.——Goldsb. 109. pl. 16. Anon. but seems to be S. C. and Anderson Ch. J. held the marriage to be a countermend; but the other 3 justices contrary, though all held the will void; but the other 3 thought that was by reason of the disability of the testatrix at the time of her death, when the will should take effect and be consummated.

A woman's marriage is alone a revocation of her will; per Ld. C. King. 2 Wms.'s Rep. (624.) Trin. 1731. Cotter v. Layer.

But though her will is revoked, yet if her husband, before marriage with her, was bound or covenanted to perform her will, and after her death he does not perform it, by paying the legacies therein bequeathed, his bond or covenant stands good, and is sueable against him. Went. Off. Executor, 23. cites it adjudged M. 25, 26 Eliz. Wood a case.

5. Feme by assent of baron may make testament, and executors to sue for *chofes en action*, and to possess goods and chattels which she had as executrix; but not to *give legacies*. Agreed per tot. cur. Mo. 339. pl. 459. Mich. 32 & 33 Eliz. C. B. Sir Moile Finch v. Finch.

2 And. 92. Sir M. Finche's case, S. C.——Cro. C. 106. pl. 7. Hill. 3 Car. S. P. by three justices.——Mod. 211, 212. pl. 44. Pasch. 28 Car. 2. C. B. Anon. S. P. per cur. and such a will by the husband's assent being properly a will in law, ought to be proved in the spiritual court.

6. Where the wife's making a will, and consequently an executor, *may be prejudicial to her husband*, and prevent him of some benefit or advantage, or tend to his loss or disadvantage, it shall not be available or effectual without his assent. Went. Off. Ex. 200.

7. Debt upon bond conditioned, that whereas the defendant was about to marry A. S. &c. *If he should survive her, then if within three months after her decease, he should pay to the obligee 300l. to* It was agreed that where the wife has power to dif-
and

pose in the lifetime of the baron, if it be not particularly provided that she may dispose by will, yet a disposition by a writing in nature of a will, would be a good disposition or appointment.

2 Vern. Rep. 330. pl. 315. Mich. 1695. in case of Sawyer v. Bletfoe.

and for such uses as the said A. S. by any writing under her hand and seal should appoint, then, &c. A. S. by will in writing sealed, &c. appointed such sums to be paid. The defendant pleaded, that the wife made no appointment, for that she ought to have made a deed in writing, and not a will, because a will is ambulatory and revocable, and is not to have any effect till after her death, besides that a feme covert cannot make a will. But the court (absente Jones) held the declaration good; for though a feme covert cannot make a will without the assent of her husband after it is made, yet that declaration in form of a will is good enough; and judgment nisi for the plaintiff. Cro. C. 367. pl. 2. Mich. 10 Car. B. R. Tyller v. Peirce.

8. Bond was given before marriage, that the wife might dispose of 500*l.* After marriage the wife consented to cancel the bond which was exchanged into a note, that she should dispose of it, so as he might be first acquainted with it. The wife disposed of the 500*l.* without first acquainting the husband; decreed against the husband in favour of the disposition. Chan. Rep. 118. 13 Car. 1. Palmer v. Kennel.

Chan. Cases, 118. Mich. 20 Car. 2. S. C. cited accordingly, and said that this was now declared to be a just order.

9. A feme covert living separate from her baron, and saving money out of her alimony, may by will dispose of things in or upon a trust, and that without the assent of her husband, there having been an agreement to that purpose; per cur. Chan. Rep. 125. 15 Car. 1. Gorge v. Chancy.

——Toth. 161. S. C. accordingly, as to disposing by will, but says nothing of the agreement.

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10. Debt upon bond, that whereas the obligor being about to marry M. if he should permit her to make a will of her husband's goods to the value of 100*l.* to be paid within a year after her decease, then, &c. The defendant pleaded that he did permit her to make a will, &c. But the court held the plea not good, for he ought to have pleaded that he paid accordingly, for otherwise he answers to one part only of the condition; for to be paid and to pay is all one, otherwise it would be idle to permit her to make a will, and not to pay; and judgment for the plaintiff. Cro. Car. 397. pl. 18. Mich. 16 Car. B. R. Sherman v. Lilly.

11. An authority was given to the wife to devise 300*l.* she devised 50*l.* to one and 50*l.* to another, and so on; and the court held this a good disposal. Keb. 348. in pl. 31. Mich. 14 Car. 2. B. R. Harris v. Bessie.

2 Mod. 170. Hill. 28 & 29 Car. 2. C. B. Brook v. Turner, S. C. and these points were resolved by the court. 1st, If there be an agree-

12. B. before his marriage with P. covenants with her relations to permit her to make a will of such and such goods. She made a will of those goods, and died. The will being brought to the prerogative court to be proved; the husband suggested for a prohibition that the testatrix was *fœmina viro co-operta*, and so disabled to make a will, and a prohibition was granted. Per North Ch. J. the spiritual court has the probate of wills, but a feme covert cannot make a will; if she gives any thing by her husband's consent, the

the property thereof passes from him to the legatee, and it is his gift. If the goods were given into another's hands in trust for the wife, yet her will is but a declaration of the trust, and not a will properly so called. Mod. 211. pl. 44. Pasch. 28 Car. 2. C. B. Anon.

unless the husband disagrees; and his consent shall be implied till the contrary appear. And the law is the same, though he knew not when she made the will; which when made, it is in this case, as in others, ambulatory till the death of the wife, and his dissent thereto; but if after her death he doth consent, he can never after dissent, for then he might do it backwards and forwards in infinitum. 2dly, If the husband would not have such will to stand, he ought presently after the death of his wife to shew his dissent. 3dly, If the husband consent that his wife shall make a will, and accordingly she doth make such a will and dieth; and if after her death he comes to the executor named in the will, and seems to approve her choice, by saying that he is glad that she had appointed so worthy a person, and seems to be satisfied in the main with the will, and recommends a coffin-maker to the executor, and a goldsmith for making the rings, and a herald painter for making the escutcheons; this is a good assent, and makes it a good will, though the husband, when he sees and reads the will, (being thereat displeased) opposes the probate in the spiritual court, by entering caveats and the like; and such disagreement after the former assent will not hurt the will, because such assent is good in law, though he knew not the particular bequests in the will. 4thly, When there is an express agreement, on consent that a woman may make a will, a little proof will be sufficient to make out the continuance of that consent after her death; and it will be needful on the other side to prove a disagreement made in a solemn manner, and those things which prove a dissatisfaction on the husband's part, may not prove a disagreement, because the one is to be more formal than the other; for if the husband should say that he hoped to set aside the will, or by suit or otherwise to bring the executors to terms, this is not a dissent.—3 Keb. 624. pl. 3. S. C. and it was insisted that the husband ought to have administration, because there was a surplus of things [or, besides things] in action, which the plaintiff the husband claimed by the will; and per cur. the will is void, and the husband bound only by the articles to permit it; and prohibition nisi.

13. Devise of a power to a single woman to grant an annuity. She marries. This power remains in her, and is not vested in the husband, and her disposing it by a nuncupative will is good. Fin. Rep. 346. Pasch. 30 Car. 2. Gibbons v. Moulton.

14. It was declared by the Ld. Chancellor, if the wife do make a will, and give legacies, &c. although the husband did promise her to perform it, and gave her leave to make it, nay although he did after the death of the wife assent to it, yet he is not bound by it, and the performance of it in him is only honorary, unless the husband did agree before marriage that she should do it, and then he will be bound by his agreement; but all promises after, nay if the wife makes him executor, and he proves the will, yet he is bound no farther than in honour, for the will of a wife is a void thing, and it is in strictness no will; and if a bond be given to perform the will of a married woman, and she makes a will, it hath the import of a writing, and nothing else. 2 Freem. Rep. 70. pl. 82. Trin. 1681. Chiswell v. Blackwell.

15. A man settles land of 6l. per ann. to the use of himself for life, and then to his wife for life, and agrees that she shall hold the land until 100l. shall be paid to her executors, administrators or assignees; she by a writing purporting a will, disposes of this 100l. and dies in the life of her husband. It is a good appointment in equity; per Ld. K. North. Vern. 244. pl. 235. Trin. 36 Car. 2. Bletsow v. Sawyer.

rents and profits, to pay 6l. per ann. for the separate use of M. A.'s wife, and to be at her disposal, then to the use of A. for life, and after his death to the heirs of M. till the heirs or assigns of A. should pay to the executors, administrators or assigns of M. 100l. with interest, from the death of A. then to the wife for her life, for her jointure, remainder over. M. dies, having by a will disposed of this 100l. The court thought she could not dispose of it.

ment before marriage that the wife may make a will, if she do so, it is a good will,

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2 Vern. 328. pl. 315. Mich. 1695. S. C. Sawyer v. Bletsow, stated thus, viz. A. conveys land to B. in trust out of the

16. Where

S. P. and so if a woman has pin-money, and she by management and good housewifery saves money out of it, she may dispose of such money so saved by her, or of any jewels, &c. bought with it, by a writing in nature of a will, if she dies before her husband; and shall have it herself, if she survives him; and such money, jewels, &c. shall not be liable to the husband's debts; cited by Hutchins. Chan. Prec. 44. pl. 44. Pasch. 1692. in case of Herbert v. Herbert, as decreed in Sir Paul Neal's case. — Equ. Abr. 66. cites S. C. but no book; and says that the wife was allowed what she had saved out of her pin-money, against the devise of the real estate. — Mich. 1694. between Mills & Wikes.

16. Where a feme covert *saves money out of a separate maintenance*, she may dispose of it as a feme sole; per Ld. K. North. Vern. 245. in case of Bletsoe v. Sawyer, and said that there had been several decrees accordingly.

17. Where she has power given her by her husband to make a will, *probate of such will per testes is sufficient proof*, without any other proof; because as to that purpose the husband has made her a feme sole, and no prohibition will lie. Chan. Prec. 84. pl. 75. Mich. 1697. Balch v. Wilfon.

18. Where a feme covert has a power reserved to dispose by last will or writing, and she makes her will and disposes, and the husband subscribes his approbation; in such case the person to whom she gives is *not legatee, but nominee*, and if he dies before the wife, it is *not like a legacy* which is thereby *lapsed*; but it is only the execution of a trust, and the executors or administrators shall take. Abr. Equ. Cases, 296. pl. 2. Mich. 1700. Burnett v. Holgrave.

19. Feme covert by *consent of husband* makes her will, and another feme covert executrix. Her father upon oath of her dying a widow obtained administration, and being cited below by the executrix to have the administration revoked, moves for a prohibition upon suggestion that she was covert at the time of death, and has rule nisi; and the matter being opened to the court, they discharged the rule. And per Holt, a married woman cannot make a will, even as executrix, without consent of her husband. 12 Mod. 306. Mich. 11 W. 3. Richardson v. Seife.

20. Feme by articles before marriage, reserves power to dispose of a term by will or otherwise. Two days before marriage she *makes a will*, and gives the trust of the term to B. She marries and dies. This will is not such a will of which the court below hath any jurisdiction, so as to be proved by executor, but it amounted to an *appointment in equity* who should have the trust according to the said articles; and the way here, had been to grant administration to whom she had appointed the trust, and not to proceed by way of probate. 7 Mod. 147. Hill. 1 Ann. B. R. Taylor v. Raines.

Though in strictness a feme covert cannot make a will, yet being empowered to make a writing in nature of a will, the writing will operate as a will; per Ld. Ch. King. 2 Wms.'s Rep. (624) Trin. 1723. Cotter v. Layer.

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21. Where a woman is executrix and marries, there she may make a will with consent of her baron, and cannot without; per Holt Ch. J. 1 Salk. 313. pl. 20. Hill. 1 Ann. B. R.

And if she makes a will of goods which she has as executor, and of debts otherwise due to her, the will is good as to the first, and void as to the last, and in such case her executor shall take the first, and the husband as administrator the last, so that in such sense she dies testate and intestate, and having both

both an executor and administrator. Went. Off. Ex. 201.—A feme covert cannot devise what she has as executrix without her husband's assent; and therefore a prohibition was granted to the spiritual court to hinder their proving such will. 11 Mod. 221. pl. 14. Pasch. 8 Ann. B. R.

22. If a woman, *having debts due to her*, marries, she may make a will *quoad these*, and the ordinary may prove it. In other cases she cannot; for it is only a writing in form of a will; but in the principal case, which was a will made in pursuance of a *power reserved before marriage* with the consent and privity of the intended husband, though he refused to be a witness or party to the intended deed, it appearing that the ordinary had *only granted administration quoad the goods* in this will, it was allowed as reasonable. 1 Salk. 313. pl. 20. Hill. 1 Ann. B. R. Shardelow v. Naylor.

23. If a will is made by *feme covert* of lands of inheritance to J. S. and *the baron dies*, and then *the wife* dies, though her intention is plain, and though after the decease of the baron, when she became *fui juris*, she might have devised the lands to J. S. or by a *republication* have made the former will good, yet it is not relievable in equity; per Ld. K. Wright. 2 Vern. 475. pl. 431. Hill. 1704. in case of Clavering v. Clavering.

24. Where a woman on marriage reserved a *power to dispose of her personal estate, and rents and profits of her real*, it was objected she had disposed of several mortgages, &c. that appearing not to be part of the estate over which she had reserved a power. Per Wright K. it appeared not that any other estate came afterwards to her, and therefore what she died possessed of is to be taken to be the separate estate, or the *produce of it*; and as she had power over the principal, she consequently had it over the produce of it. 2 Vern. Rep. 535. pl. 478. Hill. 1705. Gore v. Knight.

own disposal. In this case all the product or increase of it, or that which comes in lieu of it, shall be also at her disposal.——S. P. Pasch. 1719. Abr. 1 qu. Cases, 346. Gold v. Rutland, and though trustees are mentioned, yet a *disposition by her own hands* is good.

Chan. Prec. 255. pl. 207. S. C. that by consent of the man before marriage, she made over her estate real and personal to be at her

25. The baron, in consideration of a bond, given by him to trustees for the use of the wife, being delivered up to him, and of her joining with him in disposing of a leasehold estate of her's, conveys a long term, supposing it to be a fee, to trustees for his own and his wife's life, and the survivor of them, remainder *to the heirs of the wife*. She dies without issue, and by writing in nature of a will devised to J. S. and his heirs. The husband claimed it as her administrator. J. S. took out administration to her, and got a release from her heir at law; and Ld. Cowper taking all this together, decreed that J. S. was well intitled to discharge a mortgage then on the premises, and the devise good. Ch. Prec. 480. pl. 301. Hill. 1717. Marshall v. Frank.

Gillb. Equ. Rep. 143. S. C. in *testem verbis*.

26. Where a *power* is given to a woman, at that time unmarried, *to dispose by will*, and she afterwards marries, it was decreed that the *marriage is a suspension of her power*; but if she survives her husband, the power revives; but *quære inde*; for the lords sent to have the opinion of the judges upon it. MS. Tab. Feb. 9th, 1727. Rich v. Beaumond.

(S. a) Where they take by Moieties.

1. **I**N formedon, where a gift in tail is made to J. N. the remainder to the right heirs of the baron and feme, this remainder is in jointure, and survivorship shall hold place. And so where a gift is made to N. in tail, the remainder to the right heirs of P. and Q. who are dead at the time of the gift made, there the remainder is in jointure, and survivorship shall hold place; per Mowbray. Br. Jointenants, pl. 12. cites 38 E. 3. 26.

2. A personal duty being a *chose en action*, shall well lie in jointure between a man and his wife; but otherwise of other personal things. Noy, 149. in case of Norton v. Glover, cites 4 H. 6. 6. a.

3. Where the baron and feme purchases land, and the baron aliens, and dies, the feme may have cui in vita and recover the whole; for there are no moieties between the baron and feme during the coverture, and therefore it is not good for any moiety; but if they purchase before coverture, and after intermarry, and the baron aliens all, and dies, the feme shall have cui in vita of the moiety, and recover it, and the alienation is good of the other moiety. Note the diversity; for it appears. Br. Cui in Vita, pl. 8. cites 19 H. 6. 45.

4. Baron and feme purchased in fee, and after they leased for years by indenture, and after the baron released to the lessee and his heirs. This is no discontinuance, and yet this gives franktenement to the lessee during the life of the baron; by several, without doubt. Br. Release, pl. 81. cites 29 H. 8.

5. If the baron and feme purchase jointly, and are disseised, and the baron releases, and after they are divorced, the feme shall have the moiety, though before the divorce there were no moieties; for the divorce converts it into moieties. Br. Deraignment, pl. 18. cites 32 H. 8.

6. W. made a *feoffment* in fee, &c. to the use of himself for life, remainder to his son and to his wife who should be, and the heirs of their 2 bodies. The son married M. then W. the father levied a fine to king H. 8. and bound himself and his heirs to warranty, and died. The son was attainted of treason and executed, leaving issue then living. Then the queen by letters patents granted the land to another, and afterwards the widow and her issue was restored. The question was, whether she had a right to the whole, or only to one moiety? D. 122. a. b. pl. 21, 22. Mich. 2 & 3 P. & M. Sir Tho. Wyatt's case.

A. gives lands to B. and such wife as he shall after marry, or as shall be his wife. B. takes the whole; but if A. seised in fee, for advancement of his son, name, blood, and posterity, covenant to stand seised to the use of himself for life, and after to the use of his son, and such wife as he shall marry, and the heirs male of his body. A. dies, and then the son takes a wife; the wife has a joint estate with her baron, to them and the heirs male of the body of the baron. Jenk. 328. pl. 52. Trin. 3 Jac. in the court of wards. — 1 Rep. 101. a. Arg. S. P. says it was so held in Ld. Pawlet's case, 17 Eliz. D. 340. — D. 339. b. 340. &c. pl. 48, 49, 50. the judges differed in opinion, and afterwards the parties accorded between themselves, and judgment was given by default. — 2 Le. 17. pl. 25. Bient's case, S. C. argued by the judges. The case

case was, *feoffment by the baron to the use of himself and wife for life; if he survives his wife, then to the use of himself and such woman as he should after marry for her jointure*, remainder in fee to a stranger. Per Harper J. the limitation of the use cannot be pursued precisely, according to the words, and therefore the words shall be construed, after the decease of the first wife unto the use of the husband until he marries, and afterwards to the use of him and his second wife, in which case they shall take jointly. —S. C. cited 2 And. 198. Arg. —Mo. 377. Arg. cites D. 340. S. C. says it was admitted by all the justices of C. B. that the estate was good enough.

In the case of an *use* the husband takes all in the mean time, and when he marries the wife takes it by force of the feoffment, and the limitation of the use jointly with him; for there is *not any fraction, and several vesting by parcels*. See 13 Rep. 59. in Sammes's case.

A fine was levied to the use of himself and such wife as he shall after marry for their lives; and after to the use of J. his daughter, and the heirs of her body; and after he married A. M. and died; and Wray, Mead, Onslow, and Plowden were of opinion, that a good use for life was settled in A. M. * jointenant with her husband, because though the use did not settle in her completely till the marriage, yet it shall relate, as to its commencement, to the first fine executed. And afterwards the parties, not satisfied with this opinion, sued in C. B. where the case was adjudged with this resolution, as appears in writ of entry there brought, by the next in remainder against the said A. M. Mich. 13 & 14 Eliz. Arg. Mo. 517. cites it as Mutton's case. —See tit. Uses (L) pl. 1. in the notes.

7. *Copyhold land was surrendered to the use of the wife for life, remainder to the use of the right heirs of the husband and wife*. The husband entered in the right of the wife. The remainder is executed for a moiety presently in the wife, and the husband of that was seised in the right of the wife, and the *wife dying first*, her heir should have it; but if the husband had died first, his heir should have one moiety. 3 Le. 4. pl. 10. Mich. 4 & 5 P. & M. in C. B. Anon.

8. *Gift to A. and M. and to the heirs of the body of the said A. begotten of the said M.* remainder to a stranger in tail, remainder over in fee. A. after marries with M. they take by moieties. Mo. 95. pl. 235. Pasch. 12 Eliz. Brabroke's case.

9. Land is given to *baron and feme in special tail during the coverture*. Afterwards the *baron is attainted* of treason, and dies. The wife continues in as tenant in tail; the issue is restored by parliament, and made inheritable to his father, saving to the king all advantages devolved to him by the attainder of his father. The wife dies. Walmsley serj. conceived that the issue was inheritable; for the attainder which disturbed the inheritance is removed, and the *blood restored*, and nothing can accrue to the king; for the father had not any estate forfeitable; but all the *estate survived to the wife*, not impeachable by the said attainder; and when the wife dies, then is the issue capable to inherit the estate tail. Windham and Rhodes J. prima facie, thought the contrary; yet they agreed that if the *wife had suffered a common recovery*, the same had bound the king. Le. 157. pl. 221. Mich. 31 Eliz. C. B. Anon.

10. William Ocle and Joan his wife *purchased lands to them and their heirs*. After William Ocle was *attainted* of high treason for the murder of the king's father E. 2. and was executed. Joan his wife survived him. E. 3. granted the lands to Stephen de Bitterly and his heirs. John Hawkins, the heir of the said Joan, in a petition to the king, disclosed this whole matter; and upon a sci. fa. against the patentee, has judgment to recover the lands; but if an estate be made to a man and a woman, and their heirs

before

before marriage, and after they marry, the husband and wife have moieties between them. Co. Litt. 187. b.

D. 149. b.
pl. 8. Trin.
3 & 4 P. &
M. Bedel
v. Holstock.
S. P. but if
they had any
issue, such
issue should
have a for-
medon of the
wbole.

11. If a *feoffment* had been made before 27 H. 8. of *uses*, to the use of a man and a woman and their heirs, and *they intermarry*, and then the statute is made; if the husband aliens, it is good for a moiety, for the statute executes the possession according to such quality, manner, form and condition, as they had in the use, so as though it vests during the coverture, yet the act of parliament executes several moieties in them, seeing they have several moieties in the use. Co. Litt. 187. b.

Goldsb. 148. pl. 72. Hill. 43 Eliz. S. P. held accordingly; per tot. cur. without argument. — Mo. 92. pl. 228. Trin. 10 Eliz. Symonds's case, S. P. held accordingly by Welch, Brown & Dyer, but Weston and Bendlows e contra; but all agreed that several moieties might be of estate tail, as well as of fee simple between baron and feme. — S. P. adjudged by the advice of Wray & Anderson Ch. J. in the court of wards, that the husband and wife took by moieties. Mo. 715, 716. pl. 1000. Mich. 32 & 33 Eliz. The Queen v. Savage.

The confir-
mation in
this case to
the husband
and wife for
their lives
makes them

12. If I lease land to a *feme sole* for term of years *who takes baron*, and afterwards I *confirm the estate* of the baron and his wife, to have and to hold the land for term of their two lives, they have joint * estate in the freehold of the land, because the wife had not franktenement before. Co. Litt. f. 526.

jointenants for life; because a chattel of a feme covert may be drowned, and so note a *diversity* between a *lease for life*, and a *lease for years* made to a feme covert; for her estate of freehold cannot be altered by the confirmation made to the husband and her, as the term for years may, whereof her husband may make disposition at his pleasure. Co. Litt. 300. a.

* [171]

Pl. C. 483.
a. Mich. 17
& 18 Eliz.
in case of
Nicholls v.
Nicholls,
S. P. in to-
tidem verbis.

13. If a *feoffment* be made to a man and a woman, and their heirs with warranty, and they intermarry, and after are impleaded, and vouch, and *recover in value*, moieties shall not be between them; for though they were sole when the warranty was made, yet at the time when they recovered and had execution they were husband and wife, in which time they cannot take by moieties. Co. Litt. 187. b.

—D. 149.
b. pl. 82.
Trin. 3 & 4 P. & M. Bedyl v. Holstock.

14. If an estate be made to a *villein and his wife being free*, and to their heirs, albeit they have several capacities, viz. the villein to purchase for the benefit of the lord, and the wife for her own; yet if the lord of the villein enter, and the wife survives her husband, she shall enjoy the whole land, because there are no moieties between them. Co. Litt. 187. b.

And they do
not hold
jointly for
two reasons.
1st, The
wife has
the whole
for her life,
and jointe-

15. *Lease for life to feme sole*, who takes husband, *lessor confirms the estate of baron and feme*, to have and to hold for term of their lives; in this case the baron does not hold jointly with his wife, but holds in right of his wife for term of her life; but this shall enure to the baron for term of his life if he survives the wife. Co. Litt. f. 525.

nants must come in by one title; but in this case, if the confirmation had been made to the husband and wife, to have and to hold the land to them two, and to their heirs, they had been jointenants to the fee simple, and the husband seized in the right of his wife for her life; for the husband and wife cannot take by moieties during the coverture. Co. Litt. 299. a. b.

16. If a reversion be granted to a man and a woman, they are to have moieties in law, but *if they intermarry, and then attornment is had*, they have no moieties (and yet by the purport of the grant they are to have moieties), because it is by *act in law*. Co. Litt. 310. a.

Pl. C. 483. Mich. 17 & 18 Eliz. in case of Nicholls v. Nichols, S. P. ac-

cording y; for though they were sole when the grant was made, yet when the reversion settled in them they were baron and feme, between whom there are no moieties, and so the time in which the thing vests, ought to be respected.

17. If a gift be made to a man and a woman not married, though with an intention of their intermarriage, and afterwards they intermarry, yet they take by divided moieties. Noy, 122. Ward v. Mathew. — And cites it adjudged in one Edmunds's case.

18. *Articles before marriage to settle a term* to himself for life, to his son for life, to the use of the woman the son was about to marry, and after their decease to the use of the issue of their two bodies to be begotten according to the descent of lands so intailed. After marriage the lease was assigned to those uses. The reporter says, the articles being before marriage, the son and his wife took by divided moieties. Chan. Cases, 266. Mich. 27 Car. 2. in case of Bullock v. Knight.

19. Baron purchased a copyhold, and takes surrender to himself, his wife and his daughter and their heirs; per lord commissioners, baron and feme take one moiety by entierties, so as the baron cannot alien so as to bind the feme, and the other moiety is well vested in the daughter; per commissioners. 2 Vern. Rep. 120. pl. 120, Hill. 1690. Back v. Andrews.

Chan. Pree. 1. pl. 1. S. C. decreed accordingly.

(T. a) Take. In what Cases Feme may take by [172] Grant to herself.

1. *Obligation made to a feme covert* is good. Br. Obligation, pl. 36. cites 4 H. 6. 31.

Br. Testament, pl. 9. cites S. C.

—S. P. Br. Nonability, pl. 2. cites 3 H. 6. 23. — *A man was bound to baron and feme, and he made the feme his executrix and died, and she brought debt upon the obligation as executrix of the baron, and well, per Coke J. for she may waive it by the coverture, and refuse the survivorship; but Weston serj. contra.* Br. Waiver de Choses, pl. 13. cites 4 H. 6. 5.

2. Trespass upon the statute of 5 R. 2. ubi ingressus non datur per legem. The defendant pleaded gift in tail, the remainder to a feme covert, to which A. B. husband of the said feme agreed, and so concludes her baron and gave colour. Quære if the agreement be necessary; for it seems that it is in the feme till the baron disagrees. Br. Agreement, pl. 1. cites 3 H. 7. 9.

3. * *Fcoffment made to feme covert, or gift of goods to her, &c.* is good if the baron agrees, or if he does not disagree. Br. Coverture, pl. 3. cites 27 H. 8. 24.

* Br. Action sur le Case, pl. 5. cites S. C.

(U. a) Inter fe. Mis-usage.

1. *Attempt to cut the husband's throat*, is a cause for which the husband may be *divorced*; per curiam. Lane, 98. Hill. 8 Jac. in the exchequer, in case of Scot v. Helyer.

Godb. 215.
pl. 307. S. C.
accordingly.

2. The wife of Sir Thomas Seymor libelled for *alimony*, because the baron beat her so that she could not cohabit with him; the court denied a prohibition, but if she had cohabited, she could not have sued for alimony. Mo. 874. pl. 1219. Hill. 11 Jac. Sir Thomas Seymor's case.

Godb. 215.
pl. 307. S. C.
& S. P. and
cites F. N.
B. 80. (F)

3. A wife may have the *peace* against the baron for unreasonable correction. Mo. 874. pl. 1219. Hill. 11 Jac. in Sir Thomas Seymor's case.

—Litt. Rep. 189. Arg. Mich. 4 Car. in Stanlie's case, in C. B. the S. P. —The court being informed of his ill usage of his wife, a supplicavit de bono gestu was granted. 2 Vent. 345. Trin. 32 Car. 2. in chancery, Sir Jerom Smithson's case.

4. Debt on bond by A. against the baron. The condition was, that he should *not sell his wife's apparel*, it is good, as if baron be *bound to a stranger* to pay 20l. per ann. to his wife, it is good; per Coke. Roll. Rep. 33. pl. 43. Hill. 13 Jac. B. R. Smith v. Watson.

5. *Taking away the wife's apparel, and other of her necessities*, is good ground for her to *sue a divorce causa savitiæ*. Sid. 118. Pasch. 15 Car. in case of Manby v. Scott.

3 Keb. 433.
pl. 37. Ld.
Leigh's case,
S. C. ac-
cordingly.

6. Baron for *ill usage* was bound by the court to his *good behaviour*. 2 Lev. 128. Hill. 26 & 27 Car. 2. B. R. The King v. the Ld. Lee.

And by Hale Ch. J. the *salva moderata castigatione* in the Register, is not meant of beating, but only of admonition, and confinement to the house in case of her extravagance, which the court agreed. — 3 Salk. 139. pl. 4. S. C. — Freem. Rep. 376. pl. 488. S. C. — 11 Mod. 109. pl. 2. Pasch. 6 Ann. B. R. The Queen v. Ld. Geo. Howard. — But the court cannot remove her from the baron. 2 Lev. 128. Hill. 26 & 27 Car. 2. B. R. The King v. Ld. Lee.

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7. In a bill to establish an agreement for a separate maintenance for the defendant's wife, the plaintiff *prayed a discovery* of several unkindnesses and hardships to the wife, *to make her recede from the agreement*. The defendant demurred, as a matter not properly examinable or relievable in this court. Vern. 204. pl. 200. Mich. 1683. Hinks v. Nelthorp.

Chan. Prec.
235. pl. 200.
Ld. Rock-
ingham and
Lady Oxen-
den v. Sir
James Ox-
enden, S. C.
decreed ac-
cordingly. —
Gillb. Equ.
Rep. 1.

8. By articles before marriage 6000l. part of the wife's portion, is paid, and a settlement made of 1000l. per ann. and 6000l. *residue of the portion, to be vested in land*, and settled to baron for life, to the feme for life, remainder as a provision for younger children. The husband, *by cruel usage*, having forced the feme to *separate* from him, the court decreed the 6000l. to be put out at interest, and be paid to the feme for her *separate main-tenance* till a cohabitation. 2 Vern. 493. pl. 144. Pasch. 1705.

Lady

Lady Oxenden, per prochein amy, v. Sir James Oxenden & al^r. Pasch. 1706. Et c contra. S. C. says the lady had

a decree for 300l. a year out of a trust estate, which the court laid hold of as being under a trust, and in their possession; but that the Ld. Keeper doubted what to have done, had there been no such trust estate to have laid hold of, and said he would give no opinion, it not being the case in question. MS. Rep. S. C. in totidem verbis with Gilb. Equ. Rep.

9. Feme being parted from her husband, by reason of cruelty, becomes intitled to 3000l. as her share of her mother's personal estate, who died intestate. Harcourt Ld. K. decreed the interest to the feme for her separate use for her life, and after to the husband, if he survived, for his life; and if any issue, then the principal to the issue; but if no issue, then to the survivor of the husband and wife. Memorandum; the baron had given a note to the feme, that if he should again use her ill, she should have her share of her mother's estate to her own use. 2 Vern. 671. pl. 598. Pasch. 1711. Nichols & Danvers v. Danvers.

10. Baron proves drunken, abusive, wasteful, and cruel to his feme. The court decreed the interest of a bond of 500l. given to trustees for the feme's portion, to be paid to the feme for her separate maintenance. 2 Vern. 752. pl. 657. Mich. 1717. Williams v. Callow.

11. As to the coercive power which the husband has over the wife, it is not a power to confine her; for by the law of England she is intitled to all reasonable liberty, if her behaviour is not very bad. 8 Mod. 22. Mich. 7 Geo. 1. Lyster's case.

Coke Ch. J. thought the husband could not give correction to

the wife; but Nichols and Warburton J. held the contrary. Godb. 215. in Sir Thomas Seymour's case.

She cannot either by herself or her prochein amy bring a *hominie replegiando* against him; for he has by law a right to the custody of her, and may, if he think fit, confine but not imprison her; for if he does, it will be good cause for her to apply to the spiritual court for a divorce *propter sevitiam*. Chan. Prec. 492. Pasch. 1718. Atwood v. Atwood. Gilb. Equ. Rep. 149. S. C. in totidem verbis.

(W. a) Where they live separate.

1. A Woman living separate from her husband, snatched away money out of 100l. which was going to be paid to her mother. Her husband is not chargeable in equity with the money so taken; but the wife ought to answer the same, and to put in her answer in this court, or to be prosecuted for contempt. Chan. Rep. 68. 9 Car. 1. Plomer v. Plomer.

2. The wife prosecuted the husband for having a 2d wife; but the same was not proved. But he being in court on his recognizance, after the acquittal, she prayed to charge him with actions for necessities for herself and children, and the court allowed her to do so, she having proved her own marriage clearly before. 2 Keb. 585. pl. 129. Mich. 21 Car. 2. B. R. Hume's case. [174]

3. Baron left his wife 20 years since in the country, and lived in London, and married another. The wife coming to London to prosecute him, he got her arrested. The gaoler sues the baron for her diet and lodging while she was in prison. Per Hale Ch. J.

the baron is not chargeable without some evidence of his assent, as if he had visited her in prison, or by some act had approved the provision of the gaoler; but here the contrary appears; for she came to prosecute him, and she was committed to gaol, and had clergy on her prosecution; and if he will not allow her necessities, she should have complained in course of law for maintenance. 2 Lev. 16. Trin. 23 Car. 2. B. R. Calverly v. Plummer.

4. Goods devised to M. (the wife of B.) for life, and after her death to A. M. and B. were parted, and there had been great suits for alimony, and M. during the separation had wasted the goods. North Ld. K. thought it reasonable that B. should be charged for this conversion of M, A.'s title being paramount the feme, and not under her. Vern. Rep. 143. pl. 136. Hill. 1682. Ld. Paget v. Read.

5. In case for meat, drink, washing and lodging, found for the wife of the defendant by the plaintiff. The proof was, that the wife came in a necessitous condition, and said to the plaintiff that she was the wife of the defendant, and that he had turned her out of his house, and allowed her 50l. per ann. but he would not pay it. Holt Ch. J. held, that the husband is not chargeable; for it being apparent that they did not cohabit, he shall not have a credit to charge him without his consent; and though it was proved that he had paid another who had received and tabled her, before the plaintiff received her, yet the plaintiff was nonsuited. Skin. 323, 324. pl. 2. Mich. 4 W. & M. in B. R. Pierce v. Welden.

If the wife elopes, and takes up necessities upon credit of a tradesman, tho' the tradesman has no notice the husband is not liable.

6. If a wife cohabits with her husband, and by it gains a credit, though she departs without the leave of her husband, and comes to London, and becomes in debt, the husband shall be charged till notice given of her elopement; for it shall be intended to be with the consent of the husband; but after notice, the husband shall not be charged, without his consent. Skin. 324. Mich. 4 & 5 W. & M. in B. R. in case of Pierce v. Welden.

Ld. Raym. Rep. 444, 445. says it was so ruled by Holt Ch. J. at Exeter Lent assizes, 10 W. 3. in case of Longworthy v. Hockmore. — S. C. cited by Holt Ch. J. 12 Mod. 245. Mich. 10 W. 3. in case of Tod v. Stokes, where he held accordingly, that the husband in such case should not be liable; and it is sufficient for the husband to give general notice that tradesmen, &c. should not trust his wife. But serj. Wright, now Ld. Keeper, at the same time acquainted his lordship, that Treby Ch. J. of the common pleas had ruled that point otherwise between the same parties; to which Holt said, that notwithstanding that, he would adhere to his opinion in all the points aforesaid; and the plaintiff was nonsuited.

Ld. Raym. Rep. 444. S. C. and ruled by Holt Ch. J. that though it was not

7. After notorious separation by consent, and a separate allowance, it is unreasonable she should have it in her power to charge him, and a personal notice is not necessary; it is sufficient that it be public and commonly known; per Holt Ch. J. at Guildhall. 1 Salk. 116. pl. 6. Mich. 8 W. 3. Todd v. Stoakes.

the general reputation in London, where the plaintiff lived, that the defendant and his wife were separated, yet since it was the general reputation in the place where the defendant lived, and that for 5 years past, it was sufficient; but if she had come immediately from her husband after the separation, before it could have been publicly and generally known, and had taken up necessities upon credit, the husband would have been liable. — 12 Mod. 244, 245. S. C. held accordingly. — S. P. per Cowper C. Chan. Pree. 499. in case of Augier v. Augier.

8. If the husband turns away his wife, and afterwards she takes up necessaries upon credit of a tradesman, the husband shall be liable to the tradesman to pay for them. *Ld. Raym. Rep. 444, 445.* says it was so ruled by Holt Ch. J. at Exeter Lent assizes, 10 W. 3. in case of Longworthy v. Hockmore.

9. After an agreement for parting, and the husband having given a note to the wife's father to pay back the portion, he saving the husband harmless, the wife went and lived with her father, and he brought a bill for the portion to be paid back, offering to perform the agreement on his part. The husband offered to take his wife home, and maintain her and child, and to pay the father for the time past; but decreed the husband to pay back the portion to the father, upon his giving security to indemnify the husband against the debts and maintenance of the wife and child. 2 Vern. 386. pl. 353. Mich. 1700. Seeling v. Crawley.

10. Money earned by the wife living separate shall go towards her maintenance to keep her. 1 Salk. 118. Pasch. 2 Ann. coram Holt Ch. J. at nisi prius in Middlesex. Warr v. Huntley.

11. Though the wife be ever so vicious, if the husband cohabits with her, he is liable to pay for necessaries furnished her; so if he turns her away for her wickedness; but if she leaves him, they that trust her, after it is notorious that she has left him, do it at their peril. But if he once receives her again, or came after her, or lay with her but for a night, that would make him liable to her debts, as in case of dower; per Holt Ch. J. 6 Mod. 171. Pasch. 3 Ann. B. R. Robinfon v. Gosnold.

12 Mod. 245. Todd v. Stokes.—If she goes away without his consent, she shall find credit where she goes without any charge to her husband of his giving any personal notice of leaving him; per Holt Ch. J. 12 Mod. 245. Mich. 10 W. 3. at Guildhall, Todd v. Stokes.—And he said, that this had been carried too far in the case of Scot v. Manby.

1 Salk. 119. pl. 13. S.C. per Holt Ch. J. at Guildhall.—He must send credit with her for reasonable expences; per Holt Ch. J.

12. After an agreement to live separate, he shall not compel her by force to live with him again, or confine her for that purpose; but it was ordered that he have leave to write to her, and to use any lawful means to a reconciliation, and if she was willing to see him, the children and servants should not hinder him, unless by her order. But that whenever she permitted his coming to her, he should not offer any violence, or uncivil behaviour to her person. 8 Mod. 22. Mich. 7 Geo. 1. Lister's case.

(X. a) Alimony, or separate Maintenance.

1. THE plaintiff sets forth in her bill, that she joined with her husband in sale of part of her inheritance, and after some discord growing between them, they separate themselves, and 100l. of the money received upon sale of the lands was allotted to the plaintiff for her maintenance, and put into the hands of Nicholas Mine, &c. and bonds then given for the payment thereof unto H. G. deceased, to the use of the plaintiff, which bonds are come to the defendant as administrator to the said H. G. who refuses to

deliver

deliver the same to the plaintiff, and hereupon she prays relief; the defendant does *demur in law*, because the plaintiff sueth without her husband; and it is ordered the defendant shall answer directly. Cary's Rep. 124. cites 21 & 22 Eliz. Sanky, alias Walgrave v. Golding.

Godb. 215.
pl. 307. S. C.
accordingly.

2. She cannot sue for it during cohabitation. Mo. 874. pl. 1219. Hill. 11 Jac. Sir T. Seymour's case.

A feme covert being separated, having an allowance of 200l. she

improved it, and disposed of it by her will. Toth. 161. Mich. 15 Car. Gorges v. Chancie. — Chan. Rep. 125. Gage v. Chansey, S. C. decreed. — S. C. cited Arg. Chan. Cases, 118. and says, that upon debate this was established as a good disposition, and says, that this now was declared a just order. Mich. 20 Car. 2.

The wife of an improvident husband had, unknown to him, by her frugality, raised some monies for the good of their children, which she had disposed of for that purpose, they being otherwise unprovided for, and this disposition of the wife was established by a decree of Ld. Coventry; but afterwards upon a review and assistance of the judges, this decree was reversed, as being dangerous to give a feme power to dispose of her husband's estate. Chan. Cases, 117, 118. Arg. cites it as about 1639. Scot v. Brograve.

Litt. Rep.
78. S. C.
accordingly.
—S. P. and
after a sen-

tence there for a separation propter sevitiā and alimony allowed there, the husband moved for a prohibition on an offer of cohabitation, and to give caution to use her fitly, but it was denied, the court of the ordinary being the proper court for alimony. Cro. J. 364. pl. 1. Hill. 12 Jac. B. R. Hyat's case.

In a suit by the wife against her husband for alimony, the court de-

creed the defendant to pay the plaintiff 300l. a year, so long as they lived apart. Chan. Rep. 164. Anno 1630. Ashton v. Ashton.

6. A wife hath a stock for her own use, and dies, who is buried by a friend without direction of her husband, he that buries her must be at the charge, and not the husband. Mich. 14 Car. Toth. 161. Poole v. Harrington.

Contra per
the other
justices.
Ibid. 125.

7. The spiritual court never allows any suit for alimony but after divorce, though sometimes they have decreed it upon divorce; per Twisden J. who said that the judges of the spiritual court had so informed him. Sid. 116. Pasch. 15 Car. 2. in case of Manby v. Scot.

Upon a bill brought by the wife against her husband to

be relieved for such separate maintenance, the husband demurred, because she sued without her husband, but it was over-ruled. N. Ch. R. 88. Raynes v. Lewis. — Chan. Cases, 35. Mich. 15 Car. 2. Regnes v. Lewis, S. C. accordingly. — Bill was brought by the wife's prochain amy against her husband. Chan. Prec. 496. Trin. 1718. Augier v. Augier. — Gilb. Equ. Rep. 152. Angier v. Augier, S. C. in totidem verbis.

8. A deed by which the baron agreed to allow the wife a separate maintenance was confirmed in chancery. Fin. R. 73. Hill. 25 Car. 2. Turner v. Boteler & al'.

9. The baron covenanted with L. to pay his wife, or such as she appoint, 50*l.* a year as a separate maintenance, provided she live at such a place as N. and W. appoint. Baron pleaded, that she did not live at such place as N. and W. appointed. Plaintiff replies, that she was always ready to live at such place, but that N. and W. appointed no place. * Defendant demurred, for that it was a condition precedent; but plaintiff insisted it was only subsequent, and so become impossible, N. being since dead, and no place being appointed. Per cur. the condition is subsequent, the covenant being, in pursuance of a former absolute agreement, to pay so much, and it is like an assent of the husband, which is intended, till the contrary appears. 3 Keb. 363. pl. 43. Mich. 26 Car. 2. B. R. Leech v. Beer.

10. No alimony except pro expensis litis can be decreed but by consent, unless first there is a decree for separation. Chan. Cafes, 251. Hill. 26 & 27 Car. 2. Whorewood v. Whorewood.

11. Action at law against the executors of the baron for goods bought in the baron's life-time by the wife, while she lived separate, and had a separate maintenance, and after verdict for the plaintiff at law, the executors bring bill for relief, and suggest as above, and that the plaintiff knew it to be so, and prayed an injunction; but denied, it being a proper defence at law. Vern. 71. pl. 66. Mich. 1682. Ferrars v. Ferrars.

12. Where, on a separation, lands are conveyed by the baron in trust for the feme, chancery will not bar the feme from suing the baron in the trustee's name, and a surrender or release by the baron shall not be made use of against the feme. 2 Chan. Cafes, 102. Pasch. 34 Car. 2. Mildmay v. Mildmay.

ed from her husband, and the husband * offering in his answer to take her again, Finch C. would make no order in it; but that she might proceed at law against the husband, as in the place of the tenants, and recover the rents there if she could.

* An original bill to set aside a decree for alimony, and which was confirmed in the house of lords, was adjudged proper, the husband offering in it to be reconciled, and decreed accordingly; but not to vacate the decree wholly, but to be a security for good usage, and the husband to bring in all arrears of the alimony into court in the first place. Fin. Rep. 153. Mich. 26 Car. 2. Horwood v. Horwood. —Chan. Cafes, 250. Whorewood v. Whorewood, S. C. accordingly. —Chan. Rep. 223. 14 Car. 2. S. C. but upon another point.

13. A woman living separate from her husband, and having a separate maintenance, contracts debts. The creditors, by a bill in this court, may follow the separate maintenance whilst it continues; but when that is determined, and the husband dead, they cannot by a bill charge the jointure with the debts; by Ld. Keeper North; and the rather because the executor of the husband, who may have paid the debt, is no party. Vern. 326. pl. 322. Pasch. 1685. Kenge v. Delaval.

14. Defendant covenanted with the plaintiff to permit S. the defendant's wife to live separate from him, until he and she should by writing under their hands, attested by 2 witnesses, give notice to each other that they would again cohabit; and that during the coverture, and until such notice, he would pay unto the plaintiff 300*l.* per ann. for her maintenance, by quarterly payments, &c. and for 75*l.* being one quarterly payment, he brought action of covenant. The defendant

Vern. 53. pl. 50. S. C. but the wife being a very lewd woman, and having elop-

defendant pleaded in bar, that after the said indenture, and before this action brought, another indenture was made between him and S. his wife of the one part, and the plaintiff of the other part, reciting the said first indenture; and also that he and his wife did intend to cohabit, and did then actually cohabit; and that so long as they should cohabit, the said yearly payment should cease; and that in the said last-recited indenture the plaintiff did covenant with the defendant, that he should be saved harmless from the said yearly payment, so long as he and his wife should cohabit; and avers that ever since the last indenture they did cohabit, and demands judgment of the action. The plaintiff replied, that they did not cohabit *modo & forma*, &c. Adjudged per tot. cur. for the plaintiff; for unless the cohabitation had been according to the first indenture, it was no bar, the last indenture not having taken away the effect of the former, and a later covenant cannot be pleaded in bar of a former; but the defendant must bring his action on the last indenture, if he would help himself. 2 Vent. 217. Mich. 2 W. & M. in C. B. Gawden v. Draper.

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1 Saik. 115.
pl. 4. S. C.
accordingly.
— 12 Mod.
39. S. C. ac-
cordingly.
— See tit.
Prohibition
(Q) pl. 10.
& 11. and
the notes
there.

15. Where baron and feme live separate, and alimony is sentenced to the wife, if the wife sues in the spiritual court for defamation, the baron cannot release the costs; otherwise if baron and feme cohabit. So of a legacy; but if the suit be there for a legacy, which is originally due to the baron and feme, and is not a part of the alimony, he may release the suit, and also the costs, because he may discharge the principal; per Holt Ch. J. 5 Mod. 71. Mich. 7 W. 3. Chamberlain v. Hewson.

Note here
the woman
lived very
decently and
modestly all
the while
she was in
the plain-
tiff's house,
and it was

16. Though a husband be bound to pay his wife's debts for a reasonable provision, yet if *she parts from him*, especially by reason of *her misbehaviour*, (as in the principal case it must be presumed she did, she living in adultery after the separation) and he allows her a maintenance, he shall never after be *charged with her debts, till a new cohabitation. 6 Mod. 147. Pasch. 3 Ann. at nisi prius, coram Trevor Ch. J. Cragg v. Bowman.

also proved, that her maintenance was duly paid her. Ibid. * S. P. per Ld. Cowper; however, to avoid the expence the husband might be put to in defending such suits, he sent it to a master to settle a security to indemnify the husband against her debts. Chan. Prec. 496. Augier v. Augier. — Gilb. Equ. Rep. 152. Angier v. Angier, S. C. in totidem verbis.

17. Wife having separate allowance, and being separated, may make a gift of what she saves as a feme sole. MS. Tab. December 6, 1705. Gage v. Lister.

18. Dutton having more than 3000l. per ann. married M. the plaintiff, who had 10,000l. portion, and settled 1000l. per ann. upon her for her jointure, and the greatest part of D.'s estate was settled upon the first and every other son in tail male successively, as usual in marriage settlements. D. run greatly in debt, and J. his eldest son being of full age, D. upon a calculation of his debts, and the value of his estate for life, with impeachment of waste, agreed with J. to convey all his estate to him, and J. covenants to pay all

all D.'s debts, and to allow him 500l. per ann. rent-charge for his life; and further (upon which the question arises) that J. shall indemnify D. from all debts, charges, and expences for the maintenance of the said M. being then separated by consent. M. brings a bill against D. her husband, and J. the son, to have an allowance for her maintenance, &c. Cowper C. said, that by this covenant to indemnify the father from maintaining his wife, the son has taken upon himself the charge of maintaining her, and, as to this purpose, stands in the place of the husband, who is bound to give his wife an allowance, if he voluntarily separates from her; and he took *the son in this case to be in nature of a trustee for the wife, so far as a reasonable allowance for her maintenance; and though the son doth offer to maintain her at his own house, yet he did not think she is bound to accept that offer; for though he stands in the place of the husband as to her maintenance, and a husband is not bound to allow any thing to his wife for maintenance if he offers to take her home, yet in this case here lies no such obligation upon the wife to live with the son, and though she refuses, she ought to have a reasonable allowance; and ordered her to be allowed 200l. per ann.* Note, in this case Ld. Chancellor allowed her to keep the plate, &c. which he bought, or was given to her by her friends, during the separation. MS. Rep. Trim. 1 Geo. Canc. Dutton v. Dutton & al'.

19. An agreement between husband and wife to live separate, and that she should have a separate maintenance, shall *bind them both till they agree to cohabit again.* 8 Mod. 22. 7 Geo. 1. Lister's case.

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S. P. Chan.
Prec. 496.
Trin. 1718.
Augier v.
Augier.

20. In the case of separate maintenance, if the *husband maintains the wife, it bars her claim in respect thereof:* per Ld. C. Macclesfield. 2 Wms.'s Rep. 84. Mich. 1722. in case of Powell v. Hankey and Cox.

21. In case of a wife's separate maintenance; if it be *not demanded by her, she will be concluded,* even where she has no other person to demand it of but her husband; per Ld. C. Macclesfield. 2 Wms.'s Rep. 84. Mich. 1722. in case of Powell v. Hankey & Cox.

22. Though the wife has a separate maintenance, with power to make a will, and by will *makes an executor, and disposes of all she had,* but the executor took nothing, the whole being otherwise disposed of, it was decreed that the husband's estate in the hands of another person, the husband being now dead, is subject by law to *pay the wife's funeral expences.* 9 Mod. 31. Trin. 9 Geo. in Canc. at the Rolls, Bertie v. Ld. Chesterfield.

(Y. a) Feme Executrix, what she may do without her Baron.

1. **I**N detinue it was admitted, that if a *man gives a legacy, and makes his feme his executrix, and dies, and she takes baron, and after she delivers the legacy, this is well, notwithstanding*

Sid. 188. pl.
14. Pasch.
16 Car. 2.
B. R. The

court held that though standing she be covert baron. Br. Executors, pl. 47. cites 7 H. 4. 13.

anciently it had been a point whether a feme covert might assent to a legacy, yet since *Russel's case* [5 Rep. 27.] they thought it settled that she cannot assent, and they were of the same opinion; for in case she has power to assent or dis-assent to a legacy, then if a term should be devised for life to the feme, (who is also executrix) the remainder to J. S. and she takes J. S. to baron, yet it should be in her power to affirm or destroy this devise, the which would be very mischievous.

2. In trespass a feme executrix took baron, and after *she bailed the goods of the testator to J. S. without her baron*; and well, per *Vavisor et Brian*; for she may deliver legacies, and receive debts, and make a release or acquittance, and may give the goods without her baron; for she alone may do all matters in fact. *Contra of matters of record*; for she cannot sue nor be sued without her baron. Br. Executors, pl. 178. cites 16 H. 7. 5, 6.

Br. Assets
enter Mains,
pl. 8. cites
S. C.

3. Feme executrix took baron; there in debt against them as executors, *he may say that the feme was fully administered*, and the other may say that the feme has assets, &c. without speaking of the baron; for it is said there, that the feme may administer without the baron. *Quære*. Br. Executors, pl. 150. cites 18 H. 6. 4.

S. P. but she
cannot sue
without her
baron; per
Markham.
Ibid. pl. 75.
cites 21 H. 6. 30.

4. In trespass, per *Newton*, a feme covert may be executrix, and she and her baron may sue for a debt, and yet she cannot make a deed without the baron. Br. Executors, pl. 68. cites 19 H. 6. 25.

S. C. cited
5 Rep. 27.
b. but the
opinion was
utterly de-
nied. Hill.

5. If feme executrix takes baron, and after she releases debt of the testator by deed in her own name, this is good, for she represents the testator; per *Littleton*, but *Cook contra* without her baron. Br. Coverture, pl. 52. cites 18 E. 4. 10.

26 Eliz. B. R. in *Russel's case*. For though she be executrix, yet she cannot do any thing to the prejudice of her baron. But without question, the release of the baron in such case is good, and so the doubts in the books of 13 E. 1. tit. Executors 119. 4 E. 3. 45. *Barbor's case*. 18 H. 6. 4. 10. 18 E. 4. 10. 21 E. 4. 13 & 24. 2 H. 7. 15. 6 H. 7. 6. 5 H. 7. 13 & 14. are well explained.

If feme executrix deliver up a bond instead of an acquittance during the coverture, to one that was bound to her testator, the baron has no remedy; per *Keble*. Keiw. 122. pl. 74. *Casus incerti temporis*. — And she may receive money without her baron, and give acquittance for it; and if an acquittance made by her be a devastavit, yet it is good, and she and her husband are bound by it. And. 117. pl. 164. Hill. 26 Eliz. Anon. — Br. Executors, pl. 113. cites S. C. accordingly.

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6. In account, if a feme be executrix and takes baron, and after she delivers money to J. S. and her baron dies, and she brings writ of account, and does not name herself executrix; and well, because it was a thing which was once in his possession. Br. Executors, pl. 101. cites 2 H. 7. 15. Per *Keble*.

7. And Rede agreed that a feme executrix may pay debts of the testator and the legacies, but not deliver money to render account. But *Keble* said that she may do the one and the other. Ibid.

8. Feme executrix cannot make acquittance as executrix without her baron; but *contra by the spiritual law*. Br. Executors, pl. 101. cites 2 H. 7. 15.

9. D. confessed a judgment to F. who made his wife, the plaintiff, executrix, and died; she administered and married a second husband, and then, she alone, without her husband, acknowledged satisfaction, though

though no real satisfaction was made. The court held that this was not good. Sid. 31. pl. 6. Hill. 12 & 13 Car. 2. B. R. Fenner v. Dives.

10. A wife *administratrix* under 17 shall join with her husband in an action; per Twissden J. Mod. 297. Trin. 29 Car. 2. B. R. in case of Foxwift v. Tremain.

(Z. a) Power of the Baron of Feme Executrix.

1. IT was said, that if a *feme* be made *executrix* who *does not administer*, and *she takes baron*, the *baron may administer* for him and his *feme*, and prove the testament, &c. and there release of the baron is good. Br. Executors, pl. 147. cites 33 H. 6. 31.

In case of a *feme* convert made *executrix*, the baron has a great

power. *Baron may administer* and bind her though she refuses, and may * *release* the debts of the testator, but the wife cannot do any thing to the prejudice of the baron without his consent; per Holt Ch. J. 1 Salk. 306. Mich. 11 W. 3. in case of Wanford v. Wanford, cites S. C. of 33 H. 6. 31. —Baron may dispose by his grant the goods, which the wife has as *executrix*. Jenk. 79. pl. 56. —She cannot give the goods away without *consent of the husband*, and if he consents to it, then it is he that gives it; 6 Mod. 93. Jenkins v. Plume. * Without consent of the wife. Carth. 462. Mich. 10 W. 3. B. R. seems admitted in case of Yard v. Ellard.

2. If a *feme executrix takes baron*, and *he releases all actions*, this shall be a bar during the coverture without question; by the justices. But Choke doubted if it shall be a bar after the death of the baron; but per Pigot, once extinct is for ever. Br. Releases, pl. 29. cites 9 E. 4. 42. it seems to be a good bar for ever. Br. Executors, pl. 151. cites S. C. — S. P. If the baron does not except it in his release. Ibid. pl. 152. cites 39 H. 6. 15, 16. — S. P. Br. Extinction, pl. 20. cites 9 E. 4. 42.

S. P. For action personal suspended, is extinct for ever. And Brook says

3. If a *feme executrix takes baron*, and the *baron puts himself in arbitrement for debt of the testator*, and *award is made*, and the *baron dies*, the *feme shall be barred*; per tot. cur. Brook says, that from hence it seems to him, that the release of the baron without the *feme* is a good bar against the *feme*, quod conceditur, anno 39 H. 6. 15. and therefore * there he excepted those debts in his release, and otherwise they had been extinct. Br. Releases, pl. 79. cites 21 H. 7. 29.

* [181] S. P. But if the baron did no act in his life, the action remains to the executor, and if the baron gives the goods which the *feme* has as

executrix, the gift is good; and by this arbitrement, all the actions which she has jointly against the defendant and a stranger are gone; and the baron with his *feme* may administer their goods; quod nota. Br. Executors, pl. 96. cites 21 H. 7. 29. — Br. Dette, pl. 125. cites S. C.

4. A *feme executrix takes baron*, and they bring debt as *executors*, and have judgment. The defendant pleaded *outlawry of the husband* in bar; but per cur. clearly the husband forfeits nothing of the goods which the wife had as *executrix*; and judgment for the plaintiff. 3 Bulst. 210. Trin. 14 Jac. Hix v. Harrison.

5. The *possession* of the wife as *executrix*, is also the possession of her baron, and damages recovered in trover by them, shall be to the estate of testator, and so may concern them both. Sty. 48. Mich. 23 Car. B. R. Fremling v. Clutterbook.

(A. b) What Act of the Baron of Executrix alters the Property of Goods, &c. to himself.

Mo. 98. pl. 242. S. C. held accordingly. — Bendi. 219. 222. S. C. adjudged for the plaintiff; and see the pleadings there. — D. 331. a. pl. 21. Anon. S. C. & S. P. and the opinion of all the justices was for the plaintiff.

1. A. Made his will, by which he gave divers legacies, and then adds, "*The residue of all my goods I bequeath to Frances my wife, whom I make executrix to pay my debts.*" Frances paid the debts and legacies, and had goods left, and marries B. who made J. S. executor and died. J. S. took the goods, the widow brought detinue against J. S. and judgment for her, for notwithstanding the devise of the residue, &c. she had it not as devisee, but as executrix, by reason of the words of the devise (*to pay my debts*), which have no other meaning, but that she shall enjoy them as executrix. And. 22. pl. 45. Mich. 15 & 16 Eliz. Hunks v. Alborough.

So where feme covert is residuary legatee; the husband and the executor differ about the residuum and submit to arbitration. The money awarded to the husband will go to his executors, and not survive to the wife; for per Jefferies Ch. the award is a sort of judgment. Vern. 396. pl. 366. Pasch. 1686. Oglander v. Bafton.

2. A stranger lays claim to a term which the wife has as executrix to her baron, and her second husband by writing submits to an award the title and interest of his wife. The arbitrator awards one moiety to the claimant, and awards the other moiety to the baron and feme. The second baron dies. The wife is bound. For if the baron had granted over the term, such grant would bind the feme, and consequently the submission in this case being for the title and interest of the term, is the same in effect as if the baron had granted the term over, but if the arbitrators award that the possessor shall hold the term; this it seems does not bind the right of the other, for such arbitrement does not extinguish the right, as it does in the other case where it makes the possession to pass. D. 183. a. pl. 57. and Marg. Ibid. cites Pasch. 23 Eliz. B. R. Anon.

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3. A feme administratrix to her former husband, brought debt with her then husband upon an obligation to the intestate, and had judgment for debt, damages and costs. The feme died. The baron after a year and day brought sci. fa. to have execution; and all the court (except Hide Ch. J. who doubted thereof) conceived that the sci. fa. lay not * for the husband, because being a debt demanded by the wife as administratrix, it was in autre droit; and though they recover, yet she dying before execution, the duty remains to such person as takes a new administration as in right of the intestate; and though the baron is party to the judgment, yet he has no property in the debt, whereas he that ought to have a sci. fa. must have privity and property to have the debt, otherwise it is a vain suit. Cro. C. 208. pl. 2. Hill. 6 Car. B. R. Beamond v. Long.

And though it was farther objected that the judgment was for costs and damages which belong to the baron, though the same debt did not belong to him, and therefore the sci. fa. was maintainable for the damages;

ges; yet the court held the sci. fa. to have execution of the judgment for the debt, and also for the damages is not maintainable, and whether he might maintain a sci. fa. for the damages and costs, they would not deliver any opinion; and gave judgment for the defendant. And the case being moved at Serjeant's-inn, to the chief baron, and other barons, and to Harvey J. they all agreed in the same opinion. — Jo. 248. pl. 1. S. C. held accordingly. — S. C. adjudged accordingly. See tit. Execution (P) pl. 3. — S. C. cited. Arg. 3 Mod. 64. — S. P. held accordingly; per tot. cur. Cro. C. 464. pl. 1. Trin. 12 Car. B. R. Anon.

4. *Obligee made his wife executrix.* She married a *second husband*, who became bankrupt, and the commissioners assigned this debt. But by Holt Ch. J. they have no power to assign any thing but what is the bankrupt's estate, and if the wife dies before assignment by him, there must be an administration de bonis non. His power to dispose of her estate does not make a title in him; and though he may dispose of a term which he has in jure uxoris, yet if he becomes a bankrupt, the commissioners cannot assign over this estate; and by Powel J. they have nothing to do with the debts of the testator, but only with the debts of the bankrupt. Holt's Rep. 104, 105. Hill. 6 Ann. Lutting v. Browning.

(B. b) In what Cases the Husband must or may take Administration.

1. **W**HERE the wife has debts or duties due to her, she cannot, by making another person executor, preclude her husband from that benefit which to him should appertain as administrator of her goods. Went. Off. Ex. 200.

2. But where they belong to her as executrix no benefit can rebound to the husband by having such administration of his wife's goods; for those should go to the next of kin of the wife's testator, who must take administration de bonis non of such testator, if she has no executor, and therefore her making executor as touching these brings no prejudice to her baron, and so is out of the reason of the case of Ognell v. Underhill & Appleby. Went. Off. Ex. 200.

3. Where the wife is executrix and legatee, if she claims as executrix, and dies, if the second baron would have advantage of it, he must take letters of administration de bonis non of the first husband, and not of the wife; but if she had claimed the land and the term in it as legatee, and had not been in possession, administration taken of the rights and debts of the wife had been good as to that intent, though his wife was not actually possessed of it, but only had a right unto it, and of such things in action the husband might be executor or administrator to his wife; and if the baron takes administration differently, and brings action, he will be nonsuit; and if the wife before election marries, the baron may make the election. Le. 216. pl. 298. Mich. 32 & 33 Eliz. C. B. in case of Cheyney v. Smith. [183]

4. The wife intitled by the statute of distributions dies, before distribution, intestate, and so does the husband too soon after. Whether the interest vested in the wife did vest in the baron without taking administration to his wife, or not? It was argued
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that it did, and so that it should go to the administrator of the husband, and not to the administrator of the wife. But see the decree. 2 Vern. 302. pl. 293. Mich. 1693. Cary v. Taylor.

Built. 45.

Mich. 8.

5. Feme covert *executrix* dies intestate; administration may be granted to the next of kin of the first testator *de bonis non*. Jo. 176. pl. 9. Hill. 3 Car. B. R. in case of Jones v. Rowe.

admitted, in

case of Smith

v. Jones. — But where she is *residuary legatee*, it shall be granted to her husband. 2 Vern. 249. pl. 235. Mich. 1691. Rouse v. Noble.

(C. b) Actions. Writ and Declaration.

1. **W** RIT of *assise* brought by baron and feme was *abated*, because they were *not seised after the espousals*. Thel. Dig. 116. lib. 10. cap. 26. f. 3. cites Tempore E. 1. Br. 863.

Baron and feme seised to them and the heirs of the baron make a lease, the lessee commits waste,

they bring an *assise of waste*, and conclude *ad exheredationem eorum*, and the judgment also was entered, that they should recover the damages, whereas the damages ought to go to him only that had the inheritance. The reporter says, that it seems to be ill. Freem. Rep. 343. pl. 424. Trin. 1673. Anon.

Error of a judgment in *waste against the tenant for years* brought by baron and feme of a moiety, being seised in reversion to them and his heirs *ad exheredationem* of them. The court agreed they must join in the action, but the conclusion must be *ad exheredationem* of him, but the original not being certified it is well enough. 3 Keb. 175. pl. 12. Trin. 25 Car. 2. B. R. Curtis v. Brown, seems to be S. C.

Writ of entry in the post against baron and feme, supposing the entry of both, was adjudged good, notwithstanding that the baron found his feme seised. Thel. Dig. 116. lib. 10. cap. 26. f. 5. cites Mich. 20 E. 3. Brief 374. 17 E. 3. 40. 39 E. 3. 33. and Mich. 9 E. 2. Brief 812.

3 Writ of entry in the post against baron and feme, supposing that the feme had not entry unless after, &c. was held ill. Thel. Dig. 117. lib. 10. cap. 26. f. 30. cites 9 E. 2. Br. 812.

4. It is doubted how the writ of *assise* should be where the baron and feme are disseised of the land of the feme, and after the baron is outlawed of felony, and afterwards received to the peace, *utrum disseisivit eos vel eam*. Thel. Dig. 115. lib. 10. cap. 26. f. 1. cites Hill. 1 E. 3. 5.

5. Where a feme has common of pasture, and after the marriage at the first time that they put in their beasts they are disturbed, &c. the writ shall be *disseisivit eos*. Thel. Dig. 115. lib. 10. cap. 26. cites it as held Hill. 1 E. 3. 5.

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Assise of a rent upon rescous was brought by baron and feme, where

the feme was seised before the coverture, and rescous was made to them both after the coverture, and therefore the assise was *quod disseisivit eos*; but if the rescous be before the coverture, and she took baron, and they brought assise, it should be *quod disseisivit eam*; note the diversity, when the disseisin is made

6. A feme was seised of a rent, and took baron; they distrained, and rescous is made, and they bring assise, the writ shall say, *quod disseisivit * eos*, and not *eam*, though the baron never was seised; *quod nota*. Br. Faux Latin, pl. 61. cites 3 Aff. 5.

to the feme Tole, and when to the baron and feme. Br. Faux Latin, pl. 65. cites 8 Aff. 4. ——— Theil. Dig. 115. lib. 10. cap. 26. f. 1. cites Hill. 1 E. 3. 5. that it was held there, that where a feme is seised of rent, and takes baron, and at the next day after the espousals that rent is arrear, and they make distress, and rescous is made, the writ shall be quod disseisivit eos. ——— If a feme be seised of rent, and takes baron, who distrains, and rescous is made, they shall have assize, quod disseisivit eam. Br. Scire fac. pl. 34. cites 3 Aff. 5. [The Year-book is, that though the baron never was corporally seised, yet the writ shall be quod disseisivit eos, and not eam.]

7. Where the land descends to a feme covert, the writ shall suppose that the baron and feme have entered; but otherwise it is if he found his feme seised. Theil. Dig. 115. lib. 11. cap. 54. f. 21. cites Pasch. 7 E. 3. 320. for the entry of the feme shall be supposed. 7 E. 3. 354. 21 E. 3. 31. and 28 E. 3. 39.

8. Two femes, infants, jointenants, the one disseised the other, and she took baron; the baron and feme entered; the other ousted them, and they brought assize, quod disseisivit eam, and the writ good, and they recovered. Br. Faux Latin, pl. 63. cites 7 Aff. 17.

9. In dower by baron and feme, it was pleaded, that he was not her baron the day of the writ purchased; and it was agreed, that the writ should abate, notwithstanding that they could not have a new writ of other form. Theil. Dig. 119. lib. 11. cap. 2. f. 8. cites Mich. 11 E. 3. Brief 476.

10. In consimili casu the writ supposed that the land, after the alienation in fee, ought to revert to the baron and feme, and adjudged good. Theil. Dig. 116. lib. 10. cap. 36. f. 8. cites Hill. 18 E. 3. 2. where the writ was jus et hæreditas of the feme; and that so agrees Trin. 38 E. 3. 19. in scire facias. 7 H. 4. 19. 3 H. 6. 2. 18 H. 6. 20. and 19 H. 6. 46.

The form in the writ is, that the land shall remain to the baron and feme, as it shall revert. but it shall not

descend. Theil. Dig. 116. lib. 10. cap. 26. f. 22. cites 19 H. 6. 49. but says, that contra it is said of remainder. 38 E. 3. 19. and 6 E. 3. 268.

In scire facias by baron and feme out of a fine by which land was rendered to the ancestor of the feme, the writ was quare, &c. to the baron and feme defendere non debeat, by which it was abated; for nothing can descend to the baron. Theil. Dig. 116. lib. 10. cap. 26. f. 11. cites Trin. 27 E. 3. 82.

Writ of scire facias for baron and feme out of a fine, by which the remainder of the land was tailed to the ancestor of the feme and his heirs, &c. was abated, because it was quare to the baron and feme, daughter and heir of, &c. remanere non debeat. Theil. Dig. 117. lib. 10. cap. 26. f. 29. cites Pasch. 6 E. 3. 267.

Writ by baron and feme of remainder in jure uxoris shall say remanere debet to both; contrary of for-medon in descendit, reverter, or escheat. Br. Baron and Feme, pl. 35. cites 11 H. 4. 15. per Hill. — Br. Scire Facias, pl. 72. cites S. C.

11. Where waste is done by a feme sole, and afterwards she takes baron, the writ supposing the waste to be done by both, is good enough. Theil. Dig. 116. lib. 10. cap. 26. f. 6. cites Mich. 19 E. 3. Brief 246. 20 E. 3. Brief 252. 22 Aff. 87. Mich. 49 E. 3. 26. and 14 H. 6. 14.

12. Entry against baron and feme, de quibus the baron disseised the grandfather of the demandant. The writ was abated by judgment after the view, because no degree is made against the feme. Theil. Dig. 176. lib. 11. cap. 54. f. 36. cites Trin. 20 E. 3. Brief 392. 22 E. 3. 17.

13. In appeal of maihem by the baron and feme against the baron and feme, the writ was unde la feme pl' appellat eam, and was abated, inasmuch as no tort is supposed to the baron plaintiff, nor by the baron defendant. Theil. Dig. 116. lib. 10. cap. 26. f. 9. cites Pasch. 20 E. 3. Brief 252.

The writ supposing that the trespass was done by both, is good enough. Thel. Dig. 116. lib. 10. cap. 26. f. 6. cites S. C. — A feme covert commits a trespass vi et armis; trespass is brought against the baron and feme. The writ is, that both committed the trespass. Upon not guilty pleaded, the jury finds the woman guilty, and the husband not guilty. The book is, that the wife shall be imprisoned, and the husband not; and that the plaintiff shall not be amerced pro falso clamore against the husband; for there was no other form in the Register. Jenk. 23. pl. 43.

14. In trespasss where a feme sole does a battery, and takes baron, and action is brought against them, the writ shall be that both of them did the battery. Br. Faux Latin, pl. 70. cites 22 Aff. 87.

15. But where battery is done to the feme sole who takes baron, they shall have action quod *percussit uxorem dum sola fuit*; and so see a diversity between the plaintiff and defendant; for against the defendant it shall be general, and for the plaintiff it shall be special; and in the case above it was found that the feme was guilty, and the baron not. Br. Faux Latin, pl. 70. cites 22 Aff. 87.

Entry for disseisin in nature of assise by the baron and

16. Assise by baron and feme quod *disseisivit eam*, and no exception, and therefore well as it seems. Br. Faux Latin, pl. 73. cites 30 Aff. 4.

feme against A. quod *disseisivit eos*. Chaunt. *Protestando quod non disseisivit, &c. pro placito*, that at the time of the disseisin supposed the feme was covert with one H. and after H. died, and she married this baron; so the writ shall be *disseisivit eam, et non eos*, judgment of the writ; and per June and Cott. J. this is a good plea, though the writ does not suppose any time of the disseisin; and where the feme is disseised, and takes baron, the writ shall be quod *disseisivit eam*, by which Ellerker passed over. Br. Faux Latin, pl. 57. cites 14 H. 6. 13, 14.

Where disseisin or trespass is done to a feme sole, in writ to be brought thereof by the baron and the feme after the marriage, he need not put *dum sola fuit* but in the count. Thel. Dig. 117. lib. 10. cap. 26. f. 24. cites Hill. 21 H. 6. 33. and says see 7 H. 7. 2. and the Register, fol. 95. but the writ shall be *disseisivit eam*, or *bona ipsius la feme cepit, &c.* Cites Nat. Brev. 87.

If a feme be disseised and takes baron, they shall have writ quod *disseisivit the feme dum sola fuit*. Br. Parnor de Profits, pl. 22. cites 4 E. 4. 13. — Br. Faux Latin, pl. 107. cites S. C.

* Thel. Dig. 116. lib. 10. cap. 26. f. 21. cites S. C. and 14 H. 6. 13.

Writ of entry against baron and feme, supposing their entry by such

17. *Disseisor infeoffed a feme sole, who took baron.* The writ against them shall be, that the feme entered by the disseisor, and not that both entered by the disseisor, and yet good by award. Br. Faux Latin, pl. 103. cites 39 E. 3. 25, 26.

a one, was abated because the baron found his feme seised. Thel. Dig. 116. lib. 10. cap. 26. f. 4. cites 4 E. 3. It. Derb. Brief 744. 39 E. 3. 33. 7 H. 4. 17. 13 R. 2. Brief 647.

If a writ be to be brought against the baron, of lands which he has by his feme, the writ shall be that the wife entered by J. N. and not that the husband and wife entered by J. N. Br. Cui in Vita, pl. 26. cites 7 H. 7. 1, 2. — Br. Faux Latin, pl. 77. cites 7 H. 7. 2. S. C.

Writ of waste by baron and feme of the heritage of the feme,

18. In waste by baron and feme, upon a lease made by the feme before marriage, the writ was *ad exheredationem* of the feme; and adjudged good. Thel. Dig. 116. lib. 10. cap. 26. f. 14. cites Patch. 42 E. 3. 18.

supposing *ad exheredationem ipsorum*, was abated. Thel. Dig. 116. lib. 10. cap. 26. f. 20. cites Mich. 8 H. 6. 9.

Thel. Dig. 115. lib. 10. cap. 25. f. 5 cites S. C. and Mich. 6 E. 3. 276.

19. *Trespass by baron and feme of assault to the feme, and imprisonment till the baron made fine ad damnum ipsorum*, and the writ and count awarded good, *ad damnum ipsorum, &c.* Br. Baron and Feme, pl. 21. cites 46 E. 3. 3.

— Br. Count, pl. 29. cites S. C. & S. P. — Br. Trespass, pl. 52. cites S. C. — Br. Faux Latin, pl. 113. cites 46 E. 3. 2, 3. S. C.

In trespass for beating the wife *ad damnum ipsorum*, it was moved in arrest of judgment, that it ought to have been to the damage of the baron, because a feme covert cannot have damages; but per cur. it is good, because it is such action as may survive to her alone; but otherwise it would not be. Sid. 387. pl. 23. Mich. 20 Car. 2. B. R. *Horton v. Byles*.——2 Keb. 434. pl. 73. Hort's case, S. C. and per cur. and all the clerks, the declaration could not be otherwise, because the action and * damages survive, and in all cases of survivor the action may be laid *ad damnum ipsorum*; and judgment for the plaintiff.——S. C. cited, and S. P. held per cur. accordingly, and the plaintiff moved to arrest his own judgment for expedition. 2 Ld. Raym. Rep. 1208, 1209. Mich. 3 Ann. *Newton v. Hatter*.

A writ of trespass was brought by husband and wife for battery of the wife *ad damnum ipsorum*; and cites the Register 105. But per cur. that is not law, and judgment was arrested for this exception in the principal case. Comb. 184 Mich. 3 W. & M. in B. R. *Eaker v. Barber*.——Show. 345. Hill. 3 W. & M. in case of *Meacock v. Farmer*, S. P. the Register 105. was cited, but the court did not regard it.

20. Where a feme is lessee for years, and does waste, and afterwards the term is expired, and she takes baron, the writ of waste shall be *quas the feme tenuit*, and not *quas the baron and feme tenuerunt*. And so it shall be where she holds for term de *auter vie*, and *cestuy que vie dies*, and after she takes baron, the writ shall be *quas the feme tenuit*; but if land be leased to a feme for her life, and she leases over her estate, and afterwards takes baron, the writ shall be *quas tenent*. Thel. Dig. 117. lib. 10. cap. 26. f. 28. cites Mich. 46 E. 3. 25.

21. *Dum fuit infra atatem* against baron and feme, supposing their entry after the demise that the demandant made to the feme. The writ was abated; for it appears that the lease was made to the feme. Thel. Dig. 116. lib. 10. cap. 26. f. 16. cites 46 E. 3. Brief 777. And adds *quære*; for it may be that the lease was made during the coverture, by which they entered after the demise, and there the entry of both shall be supposed, and cites Trin. 7 H. 4. 17.

22. In assise by baron and feme it was pleaded, that she was espoused to another, and the espousals continued a long time after, which other is yet alive; to which it was replied, that she at the time of those espousals was only 3 years old, and this other of 7 years; and that she afterwards being of the age of 20 years took to baron the plaintiff, and that she never assented to the first espousals, and so is she his feme. Thel. Dig. 119. lib. 11. cap. 2. f. 11. cites Pasch. 49 E. 3. 17. 49 Ass. 7. but nothing was said further at this time. But afterwards Mich. 50 E. 3. 19. the assise was awarded to try whose wife she is.

23. So in assise by baron and feme, or debt or trespass, not his feme is a good plea to the writ. But in dower, and appeal of the death of her baron, it ought to be *ne unqups accouple* in lawful matrimony with the deceased. Thel. Dig. 120. lib. 11. cap. 2. f. 12. cites Mich. 7 H. 6. 13. 50 E. 3. 15.

24. In appeal by baron of the ravishment of his feme, upon the statute of R. 2. it was pleaded that she was never accoupled to him in lawful matrimony, and this plea was accepted, and writ to the bishop to certify. *Quære* if of necessity. Thel. Dig. 120. lib. 11. cap. 2. f. 13. cites Mich. 11 H. 4. 13.

25. A feme married *infra annos nubiles* shall not maintain writ, leaving out her baron; per Newton. Thel. Dig. 120. lib. 11. cap. 2. f. 21. cites 7 H. 6. 12.

Thel. Dig. 26. *Baron and feme lease for years*, the baron may have debt
 85. lib. 9. without counting of the death of his feme. Br. Count, pl. 83.
 cap. 5. f. 48. cites S. C. cites 9 H. 6. 11.

that the count was of a lease made by him and A. nuper his feme, and held good, without saying that she was dead.

27. In cui in vita by baron and feme, the writ was, *quod reddat* Jo. & A. uxori ejus qua fuit uxor Ro. &c. *que clamat tenere sibi & heredibus de corpore dicti Ro. exeuntibus ex dimissione Will' qui ipsum A. & præd. Ro. quendam virum, &c. inde feoffavit, &c.* and held good, notwithstanding that it may be intended that the baron by the word (*sibi*) claimed the estate to himself for life with his feme; but because it appeared that the feoffment was made to the feme, and to her first baron, the writ was adjudged good. Thel. Dig. 116, 117. lib. 10. cap. 26. f. 23. cites Mich. 18 H.

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Br. Faux Latin, pl. 37. cites S. C.—

Thel. Dig. 86. lib. 9. cap. 7. f. 16. cites S. C. but says, see 14 H. 6. 14.

and 7 H. 7. 2. held contra.—In trespass by baron and feme, *quod clausum of the baron and feme & bona & catalla sua*, apud D. cepit, &c. and counted that the trespass was done to the feme dum sola fuit. The defendant pleaded not guilty, and was found guilty, and pleaded in arrest of judgment, because the count did not warrant the writ; for there is a special writ in the Register, *quod bona & catalla uxoris cepit, &c.* and not *bona & catalla sua*, and count *quod bona uxoris dum sola fuit cepit, &c.* and it was said there, that there is a writ in the Register for the baron and feme, *quod disseiavit the feme dum sola fuit*; but where there is no other writ of form but the common writ, there the writ shall be general, and the count special. Contra where there is special form of writ for the matter; per tot. cur. Br. General Brief, pl. 13. cites 7 H. 7. 2.

29. In trespass against the baron and feme, it was agreed by all the justices, and several serjeants, that the baron shall not answer without his feme, but shall have *idem dies*, and if she be waived, then the baron shall go quit; but the one shall not answer without the other, by all. Br. Responder, pl. 2. cites 34 H. 6. 29.

Quere, in detinue of them, if it shall be taken as a personal or real. Br. Releases, pl. 88. cites 39 H. 6. 15.

30. A feme brought trespass of her evidence and charters taken; the defendant said, that after the trespass she took baron, who released to him all actions, and a good bar. Br. Releases, pl. 88. cites 39 H. 6. 15.

31. In writ of entry upon the statute of Rich. by baron and feme, the entry was supposed in *manerium ipsorum*, and held good, without saying in *manerium uxoris*. Thel. Dig. 117. lib. 10. cap. 26. f. 25. cites Pasch. 4 E. 4. 13.

A writ supposing the disseisin done by both is good enough. Thel. Dig. 115. lib. 10. cap. 26. f. 6. cites Mich. 19 E. 3. Brief 246. 20 E. 3. Brief 252. 22 Aff. 87. Mich. 49 E. 3. 26. and 14 H. 6. 14.

32. A feme disseisored took baron, the writ against them shall be *quod disseisaverunt* the plaintiff, and not *quod uxor dum sola fuit disseiavit eum*. Br. Faux Latin, pl. 107. cites 4 E. 4. 17.

33. It was held, that a man shall have writ of *account against baron and feme, quod reddat compotum de tempore quo the feme dum sola fuit was receiver or bailiff*, &c. Thel. Dig. 117. lib. 10. cap. 26. f. 26. cites Mich. 4 E. 4. 26.

34. If a *feme indebted takes baron*, the action against both shall be *debet*. Br. Baron and Feme, pl. 71. cites * 9 E. 4. 24.

7. 2. S. P. for the baron is now debtor by the marriage. * The Year-book is, that the writ shall be *debet & injuste deinent*, and that both must make their law; for the baron by marrying her had made himself chargeable and party to this duty. — 10 Mod. 163. Arg. cites S. C. and 20 H. 6. 22.

Br. General Brief, pl. 13. cites 7 H.

35. In account by the baron of receipt by the defendant by the hands of the feme of the plaintiff, the defendant may wage his law; for the baron and feme are one person in the law, and therefore it is the immediate receipt of the plaintiff himself. Br. Ley Gager, pl. 54. cites 15 E. 4. 16.

36. In *rescous brought by the baron and feme*, the writ was in *una acra terre obligata districtione the baron and feme*, &c. and held good, notwithstanding that he had the rent in right of his feme; for during the coverture the distres shall be to both. Thel. Dig. 117. lib. 10. cap. 26. f. 27. cites Hill. 15 E. 4. 17.

37. Where debt is due to a feme who takes baron, who brings action, the writ shall be *debet to both*, and shall count specially how it was due to the feme *dum sola fuit*. Br. General Brief, pl. 77. cites 7 H. 7. 2.

takes baron, and debt is brought against them, the writ shall be *debet*; for the baron is debtor with her by the espousals. Ibid.

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Br. Faux Latin, pl. 77. cites S. C. — So where a feme is indebted and

38. Dower by the baron and feme, the tenant said, that the first baron had nothing after the espousals; prift; and the demandant did not deny it, by which the tenant prayed that they should be barred; & non allocatur; for this shall be prejudice to the feme after the death of the † baron, by which they acknowledged to the tenant by fine, and the feme was examined; quod nota; for she shall not be examined upon a confession of action, therefore non recipitur; note the diversity. Br. Baron and Feme, pl. 20. cites 44 E. 3. † 19.

Brooke are as here, viz. 44 E. 3. 10. but it should be 44 E. 3. 12. [b. pl. 22.] and the tenant prayed that the confession be entered; sed non allocatur.

† The word in all the editions of Brooke is (feme) but in the Year-book it is (baron), and otherwise it is not intelligible. † All the editions of

39. The baron shall have action for *battery of his feme*, without saying *per quod*, &c. Per Frowike, Kingmill, and Fisher J. Br. Trespas, pl. 442, cites 20 H. 7. 5.

40. Baron and Feme, and J. S. brought *trespass quare clausum fregit herbam suam messuit & fenum suum asportavit ad damnum ipsius* the baron and feme, and J. S. and held the declaration good; for though it is not good for the hay, yet clausum fregit & herbam messuit makes it good. Le. 105. pl. 140. Mich. 30 Eliz. B. R. Wilkes v. Parsons.

Cro. E. 96. pl. 10. Palsch. 30 Eliz. B. R. Cookson v. Castline, S. P. and cites S. C. and though it was ob-

jected that the feme could not join for the hay, because it was a shuttle severed from the inheritance, and vested in the baron; yet the clear opinion of the court was, that they may well join, for as they may join in trespass of clauso fracto, and cutting their graft, so they may for the hay coming of it;

and adjudged accordingly.——But Wray said, if it had been for taking 20 loads of hay, without saying *inde provenient*, it is otherwise; because it may be intended hay lying on the land before, for which they cannot join. Ibid.——S. C. cited. D. 305. b. Marg. pl. 59. as adjudged accordingly.

5 Rep. 36.
a. Walcott's
case. S. C.
& S. P.
agreed ac-
cordingly
per tot. cur.

41. In *debt* against baron and feme upon a *bond by the feme dum sola*, the writ ought to be in the *debet and detinet*; for the baron has the goods of the feme in his own right; per Cook, and so is the Register 140. 3 Le. 206. pl. 263. Pasch. 30 Eliz. B. R. Walcott v. Powell.

42. If an obligation be made to a *feme covert*, and the baron *disagrees* to it, the obligor may plead *non est factum*; for by the refusal, the obligation loses its force and becomes no deed. 5 Rep. 119. b. Trin. 2 Jac. C. B. in Whelpdale's case.

43. In *trover and conversion* brought against husband and wife; it was objected that the conversion should be laid only in the baron, for the feme cannot have any property; but it was answered, that this action is not founded upon any property, but upon the possession only, and the point of it is the conversion, which is a tort which the feme may be charged with as well as in trespass or disseisin; but they cannot bring trover, and suppose the possession in themselves, because the law transfers the whole interest in point of ownership to the husband, according to 21 E. 4. 4. Quod fuit concessum per tot. cur. Yelv. 165. Mich. 7 Jac. B. R. Draper v. Fulkens.

44. In *trespass* brought by husband and wife for breaking the close of the husband, *ad damnum eorum*; after verdict, it was moved that the declaration was not good nor aided by the statute; and adjudged accordingly. Cro. J. 473. pl. 4. Pasch. 16 Jac. B. R. Marshall v. Doyle.

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Sty. 236.
Mich. 1650.
Watts v.
Lord. S. P.
being moved
in arrest of
judgment as
ill, because
the wrong
being per-
sonal only to
the feme, could not be said to be done to the baron; and to this Roll Ch. J. agreed.

45. In *trespass* by baron and feme. The declaration was of an assault and battery made to the feme, and also that the defendant *alia enormia eis intulit*; it was moved that this was ill, for the word (eis) must relate to both, and therefore the feme could not join for an injury done to the baron. But adjudged and affirmed in error, that these words are only in aggravation of damages, and not material, nor do they alter the substance of the declaration. Cro. J. 664. pl. 16. Hill. 20 Jac. B. R. Thomlins v. Hoe.

In trespass brought by baron and feme of their close broken and corn carried away, judgment was given for the plaintiffs. Error was brought and assigned that the feme ought not to join, because she had no property in the corn; and judgment was reversed. Cro. E. 133. pl. 10. Pasch. 31 Elis. B. R. Arundel

46. *Trespass* by husband and wife for breaking the close of the husband, and for battery of the wife, *ad damnum ipsorum*. The defendant to the breaking of the close, pleaded not guilty; as to the battery justified. The first issue was found for the defendant. The 2d, for the plaintiff. It was moved in regard it was found against the plaintiff for the issue in which they ought not to join, that the verdict has discharged the declaration for that part which is ill, and it is good for the rest. And of that opinion was Lea Ch. J. and Doderidge; but Haughton & Chamberlain e contra. For that the declaration being ill in itself in its substance, the verdict shall never make it good; and therefore adjournatur. Cro. J. 655. pl. 5. Hill. 20 Jac. B. R. Buckley v. Hale.

had no property in the corn; and judgment was reversed. Cro. E. 133. pl. 10. Pasch. 31 Elis. B. R. Arundel

Arundel v. Short.——D. 305. b. Marg. pl. 59. cites S. C. and that judgment was reversed, because feme covert cannot have corn in common with her baron; and if it had been, that the corn had been to them in common before the coverture, it ought to have been shewn; for a declaration ought to have a general, and not a special intendment.——So of battery and taking of a horse, *ad damnum ipsorum*; after verdict it was objected that they should have brought several actions, because the wrong is several, and therefore judgment was stayed till the plaintiff should move. Sty. 129, 130. Mich. 24 Car. *Stradling v. Boreman.*——S. P. adjudged against the plaintiff. Het. 2. Pasch. 3 Car. C. B. *Thomas v. Newark.*——See Keb. 944. pl. 2. Hill. 17 & 18 Car. 2. B. R. *Collingwood v. Bishop.*

47. An *avowry* is made upon the husband and wife, where the wife is the tenant; in this case no disclaimer lies, for the wife cannot be examined in this case, and the husband disclaimer shall not hurt the wife for her freehold or inheritance, any more than his confession shall. Jenk. 143. pl. 97.

48. In action on the case brought by husband and wife as *administratrix*, the declaration was *ad respondend' to the husband and wife, cui the administration of the goods, &c. was granted*; in error brought this was assigned for error that it was uncertain to whom (cui) should relate. But it was held good, because (cui) is intended of the wife last before mentioned. Lat. 212. Pasch. 3 Car. *Walter v. Hays.*

49. *Trespass, &c.* against the defendant, brought by the husband and wife, for beating the wife and taking the goods of the husband only, *ad damnum ipsorum*; it was objected against the declaration, that the wife cannot join for a trespass done to her husband alone, but he ought to join in a trespass done to her alone; and judgment for the plaintiff. Het. 2. Pasch. 3 Car. C. B. *Thomas v. Newark.*

If husband and wife bring an action of trespass for beating the wife, he may declare of a trespass done to him,

ad damnum ipsius the plaintiff; per Crook & Yelverton J. Het. 2. Pasch. 3 Car. C. B. *Thomas v. Newark.*

50. Case in nature of a conspiracy was brought by husband and wife, for causing them to be indicted of felony falsely and maliciously, and to be kept in prison till acquitted, *ad damnum ipsorum, &c.* After verdict and judgment for the plaintiffs, error was brought and assigned, because it was *ad damnum ipsorum*, whereas a wife cannot join with her husband for damages, because it is several to either of them; and * of that opinion was Berkley J. but Croke J. held the contrary, because the action is grounded upon one entire record in which they were both injured, and they may join if they will, or the husband may have an action alone for it, that he was damnified; *adjournatur, cæteris absentibus.* Cro. C. 553. pl. 8. Trin. 15 Car. B. R. *Dalby v. Dorthall.*

Jo. 340. pl. 7. Anon. S. C. 3 justices held that they could not join for the tort done to the baron; but if it had been for conspiring to indict the feme, they might join well enough;

but Crooke J. seemed a contra.

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51. Husband and wife as *executrix*, brought *trover and conversion of the goods of the testator*; after a verdict, it was moved that the declaration was of a joint possession of goods by husband and wife, and damages are given to them jointly, whereas the goods properly belonged only to the wife as executrix; but Roll J. answered, that the possession of the wife as executrix was also the possession of her husband, and so the damages recovered shall be to the estate of the testator,

testator, and so may concern them both. Sty. 48. Mich. 23 Car. B. R. *Fremling v. Clutterbook*.

52. *Debt by baron and feme upon a bond made to the feme dum sola*, and the declaration was *ad damnum ipforum*. It was moved that it should have been *ad damnum* of the baron only; but adjudged good, for it was a damage to the woman, the money not being paid to her when she was sole, and being now married, it is a damage to the husband. Sty. 134. Mich. 24 Car. B. R. Anon.

Keb. 784. pl. 12. S. C. & S. P. agreed per cur. that several actions should have been brought; but Wind-

53. In *trespass* by husband and wife, for *beating her and tearing her coat, ad damnum ipforum*; after a verdict, it was moved that as to the tearing the coat, which is the goods of the baron, the action should be in the name of the husband alone, and judgment was stayed; for by *Twisden J.* she cannot have action after her baron's death for the tearing her coat. Sid. 224. pl. 14. Mich. 16 Car. 2. B. R. *Staunton v. Hobart*.

ham e contra, conceived this only a consequence of the battery, and not like trover, which ought to be only *ad damnum*, or *ad usum ipsius*; and were this only for taking the coat, it ought to be *ad damnum ipsius*; *adjournatur*.

54. In action of battery by the husband and wife, for *imprisonment of the wife till he paid 10l.* Exception was taken because the conclusion was *ad damnum ipforum*; sed non allocatur, and judgment for the plaintiff. 2 Keb. 230. pl. 4. Trin. 19 Car. 2. B. R. *Brown v. Tripe*.

55. Wherever the damages do survive, the declaration may be *ad damnum ipforum*; per cur. 2 Keb. 434. pl. 71. Mich. 20 Car. 2. B. R. in case of *Atwood v. Payne*.

Mod. 9. pl. 27. S. C. adjudged for the plaintiff. — Sid. 425. pl. 10. S. C. and the court held the declaration well enough, it being laid to be to the use of the baron, and so found by the verdict. — 2 Keb. 554. pl. 41. S. C. and the court said it was agreed, in the case of *MANNY v. SCOTT*, that the husband was chargeable for necessary wearing apparel, though not against his prohibition, or upon an elopement, and so the court said now, and that this shall be intended to the use, unless the contrary appears upon the evidence, but in trover it must be specially alleged to his use, and not *ad usum ipforum*; and judgment for the plaintiff.

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3 Keb. 151. pl. 19. S. C. & S. P. adjournatur, but says it was likewise demurred to, because the marriage was not averred; sed non allocatur.

56. *Indebitatus assumpsit* against the husband *pro diversis mercimoniis, &c. sold and delivered to the wife to the use of her husband*, it being for *wearing apparel*. It was moved in arrest of judgment, that the declaration being that the sale was to the wife, though it was to the use of her husband, was ill; but the court held, it being for her apparel, and that suitable to her degree, the declaration was good, and that the husband is chargeable. Vent. 42. Mich. 21 Car. 2. B. R. *Dyer v. East*.

57. In *avowry as bailiff to baron and feme for rent arrear*, he being seised in her right. The plaintiff demurred specially, because it is * not averred that the feme is living; but by Hale, the *aretro existen'* is quasi an averment of the *life of the wife*, and after verdict, or on a general demurrer it had been good, but doubted if it is ill on *special demurrer*; but *Twisden and Wild* held it good on a special demurrer, and judgment for the avowant. 2 Lev. 88. Pasch. 25 Car. 2. B. R. *Harlow v. Bradnox*.

58. In *indebitatus* by baron and feme, as the administrator of *J. S. on account as administrator, and arrearages found to baron and feme*

feme as administrators, & super se assumpserunt to baron and feme as administrators; the defendant demurred, because this would survive to the husband, and it is not said that the debt was due to the wife as administratrix; sed per cur. this is well enough, and judgment for the plaintiff. 3 Keb. 396. pl. 96. Mich. 26 Car. 2. B. R. Harvey v. Halstead.

59. *Debt upon a judgment by husband and wife, in which they declared, that C. recovered 90l. and made the feme, plaintiff, executrix, and died, and that she took to husband quendam Philippum Bickerstaffe, &c.* The defendant pleaded, that the plaintiffs never were married, and upon a demurrer the declaration was adjudged ill, because *quendam Philippum* shall not be intended the plaintiff Philip, according to Dyer, 70. b. [pl. 39. Trin. 6 E. 6.] 2 Lev. 207. Mich. 29 Car. 2. B. R. Philip Bickerstaffe & Ux. v. Peircey.

60. Husband and wife brought an action on the case for these words spoke of the wife, *she is a whore, she is my whore*, and concluded *ad damnum ipsorum*. After a verdict for the plaintiff, it was objected in arrest of judgment, that the words were not actionable without special damages laid, and that the conclusion *ad damnum ipsorum* was ill, but it was answered, that it was good, because if she survives, the damages will go to her, and that so are all the precedents. Three justices held the conclusion was as it ought to be, but Withens J. e contra. 3 Mod. 120. Hill. 2 & 3 Jac. 2. B. R. Baldwin v. Flower.

image of the wife is the damage of the husband. Mar. 212. pl. 249. Trin. 18 Car. 2. Ryley.

3 Keb. 810. pl. 24. S. C. cites D. 90. [but it is misprinted for 70.] and says that the plaintiff had leave to discontinue.

So for saying that his wife is a whore, and keeps a bawdy house, the conclusion was *ad damnum ipsorum*; Brampton Ch. J. held the conclusion good; for the damage of the wife is the damage of the husband. Mar. 212. pl. 249. Trin. 18 Car. 2. Chambers v. Ryley.

61. In *debt upon bond* brought by husband and wife, the defendant pleaded *ne unques accouple in loyal matrimony*. The plaintiff demurred, and had judgment, because it alters the trial; for instead of trying per pais, it puts the trial on a certificate from the ordinary; and also it admits a marriage, but denies the legality of it, whereas a marriage *de facto* is sufficient, and whether legal or not is not material. 2 Salk. 437. pl. 1. Trin. 1 W. & M. in B. R. Allen & Ux. v. Grey.

but per Holt Ch. J. a plea that they were not married, or not covert in marriage, would be good.

Show. 50. S. C. adjudged for the plaintiff. — Comb. 131. S. C. the plea was adjudged ill, and a respondeat ouster was awarded;

62. *Trover* by husband and wife, and declared, *quod cum possessionat fuerunt the defendant converted them, ad damnum ipsorum, &c.* This was held ill after verdict, because the possession of the wife is the possession of the husband, and so is the property, and so the conversion cannot be to her damage. 1 Salk. 114. pl. 1. Mich. 4 W. & M. in B. R. Nelthrop & Ux. v. Anderson.

63. In *assault and battery* by baron and feme, the defendant pleaded *ne unques accouple, &c.* but held ill; for it cannot be tried at common law, the jurisdiction whereof ought not to be taken away in personal actions. Comb. 473. Pasch. 30 W. 3. B. R. Jones's case.

defendant pleaded such plea, and plaintiffs replied, that they were married at such time and place, the plaintiffs had judgment on demurrer; for per cur. in personal actions (as this was) it was right to lay the

So in case by baron and feme for a cause arising to the feme before marriage, the defendant

the matter upon the fact of the marriage, to make it issuable and triable by a jury, and not upon the right of the marriage, as the defendant has done in his plea, and as it ought to be done in appeals and real actions. 3 Salk. 64. pl. 4. Mich. 11 W. 3. B. R. *Michell v. Garrett*.——12 Mod. 276. *Michell v. Garrett*, S. C. accordingly.

2 Ld Raym. 1031. S. C. and judgment accordingly, nisi, &c. and Powell J. said he would not intend any evidence to be given as to the special damage to the husband, 64. *Trespass and false imprisonment* by baron and feme, for imprisonment of the feme, *per quod negotia domestica* of the husband *remanerunt infecta ad grave dampnum ipsorum*. After verdict for the plaintiffs, it was objected in arrest of judgment, that there being a special damage laid to the husband, the action should have been brought by him alone; but it was held good, because matter may be laid for aggravation of damages, for which no action would lie, as breaking his house, and beating his daughter, and yet trespass will not lie for beating his daughter; and the plaintiff had judgment. 1 Salk. 119. pl. 12. Hill. 2 Ann. B. R. *Russel v. Corne*.

but only admitted proof as to the battery; and that in this case the gift of the action is not the *per quod*; but if the husband had brought the action, then it would have been the gift; and Holt Ch. J. said, that if it had been *per quod consortium amissi*, the wife could not have been joined.——6 Mod. 127. S. C. adjudged for the plaintiff, nisi, &c.

65. In an action of battery brought by the husband and wife for a battery upon them, *ad damnum ipsorum*, and for that reason, after a verdict for the plaintiffs, the judgment was arrested. 6 Mod. 149. Pasch. 3 Ann. B. R. *Cole v. Turner*.

Because she may plead non est factum, it being the bond of a feme covert. 6 Mod. 311. S. C. 66. A feme covert was arrested by the name of Minors, and gave bail by that name, in an action of debt upon a bond, and afterwards the plaintiff declared against her by that name, and then she pleaded a *misnomer*; adjudged, that whatever a *bail-bond* may do in other cases, yet in the case of a feme covert it shall not estop her to plead a *misnomer*. 1 Salk. 7. pl. 17. Mich. 3 Ann. B. R. *Linch v. Hook*.

67. An indictment was for entering into a wood, and cutting down 20 asbes and 30 oaks, and they demurred, because it is said the goods and chattels of the husband and wife, which is repugnant, because trees growing belong to the inheritance; per Holt Ch. J. we may understand the husband and wife to be jointenants, and reject the bona & catalla. Judgment was for the Queen. Holt's Rep. 353. pl. 11. Trin. 6 Ann. the Queen v. Harris.

68. Action of assault and battery is brought by the husband and wife; the declaration sets forth, that the defendant such a day, &c. assaulted Eleanor the wife, and driving a coach over her, bruised her, &c. & *ratione inde* the husband laid out diversas denarⁱ summas for the cure, &c. & *al' enormia* iisdem intulit ad grave damnum ipsorum. Powell J. said, that where husband and wife join in action of assault and battery for beating both, it is wrong; but may be helped by a verdict separating the damages, and here the gift of the action is only beating of the wife, and the *ratione inde* is only in aggravation of damages. As to the *alia enormia*, it is too general to suppose damages given for it. If the *ratione inde* had been left out, the surgeon's bill might have been given in evidence in aggravation of damages. Judgment pro quer' Holt absente. 11 Mod. 264, 265. pl. 3. Hill. 8 Ann. B. R. *Todd & Ux. v. Redford*.

(D. b) Pleadings and Judgment in Actions against Baron and Feme.

1. **I**N *replevin against a feme*, she was not received to plead that *she was covert and feme to such a one the day of the writ purchased after prece partium*. Thel. Dig. 119. lib. 11. cap. 2. f. 1. cites Hill. 4 E. 3. 115.

2. In assise the baron pleaded *jointenancy with his feme*, and had *process to bring in his feme*; quod nota, and she came and joined, and maintained the exception. Br. Process, pl. 94. cites 16 Aff. 8.

3. *Entry against baron and feme, supposing the entry of the feme only*. The tenants *said, that they both entered by joint-purchase, &c.* and held a good plea, without traversing the entry of the feme only. Thel. Dig. 176. lib. 11. cap. 54. f. 34. cites Mich. 18 E. 3. 35.

It is 'no plea to say that the baron and feme entered, without traversing that she did not enter solely.

Where the entry of both is supposed, it is no plea to say that he found the feme seized, without traversing that both entered. Thel. Dig. 177. lib. 11. cap. 54. f. 47. cites Mich. 13 R. 2. Brief 647.

4. Where the baron is *estopped to plead non-tenure*, his feme shall be estopped also. Br. Baron and Feme, pl. 52. cites 24 E. 3.

5. The baron shall *plead the misnomer of his feme*. Thel. Dig. 193. lib. 13. cap. 1. f. 7. cites 30 Aff. 16.

6. In *detinue garnishment issued against one Eliz. and others, executors of such a one, &c.* Eliz. came and *said that she is covert with such a one, and was the day of the writ purchased, &c.* and held a good plea in her mouth. Thel. Dig. 120. lib. 11. cap. 2. f. 18. cites Hill. 21 H. 6. 29.

7. Where a feme who is *espoused in Ireland, or in France, is abiding in England*, and is impleaded, she may *plead that she was covert the day of the writ purchased with such a one*, her baron; per Littleton. Thel. Dig. 120. lib. 11. cap. 2. f. 14. cites Pasch. 18 E. 4. 4.

8. The husband alone cannot *demur* for his wife, by the opinion of the court. Toth. 136. cites 36 Eliz. Sturling v. Green.

9. The feme cannot *disavow the suit of her and her baron*. Br. Baron and Feme, pl. 7. cites 39 E. 3. 1.

10. A feme may *plead to the writ that she is the feme of J. not named feme*. Br. Baron and Feme, pl. 13. cites 42 E. 3. 23.

So where it is *against J. and A. his feme*, she may say to the writ that *she is not feme of J.* but the baron shall not have the plea, but the feme herself. Br. Baron and Feme, pl. 13. cites 42 E. 3. 23.

Assumpsit was brought *against the defendant as an unmarried woman*. She and her husband *plead in the following manner, to wit. And S. H. and A. his wife, late the said A. Garlick, and introduce the plea with the marriage, and then say that the said A. non-assumpsit*. The plaintiff signed judgment, as if there had been no plea in the cause, which was set aside upon hearing counsel on both sides. Barnes's notes in C. B. 169, 170. Easter, 7 Geo. 2. Amey v. Garlick.

11. Baron and feme shall not be suffered to confess *action in dower*; for there does not lie examination. Br. Coverture, pl. 76. cites 44 E. 3. 12.

12. In *quid juris clamat* against the baron and feme, they may deny the deed which binds the feme. Br. Baron and Feme, pl. 83. cites 44 E. 3. 34. and 45 E. 3. 11. accordingly. And says, see Fitzh. Quid Juris clamat 11 & 38. that quid juris clamat was maintained against feme covert. Ibid.

13. In *quid juris clamat* the baron and feme may confess a deed that the tenant holds without impeachment of waste. Contra of an infant in this action. But in per quæ servitia a feme covert was not suffered to confess acquittal; for there does not lie examination, and a feme covert shall not be bound by her consuance but where she is examined, therefore quære of the first case. Br. Coverture, pl. 67. cites 45 E. 3. 33 E. 3. and 43 E. 3. in Nat. Brev. in the addition of quid juris clamat & per quæ servitia.

14. In entry in nature of assise against baron and feme, the baron pleaded non-tenure for his feme and jointenancy for himself with a stranger, and good per cur. and not double; for he ought to answer for both. Br. Baron and Feme, pl. 88. cites 10 H. 6. 22.

Br. Coverture, pl. 76. cites S. C.

15. Feme covert shall not be received to disavow the baron's attorney; but he may make attorney for both. Br. Baron and Feme, pl. 7. cites 33 H. 6. 31.

In battery against baron and feme, the baron pleads

16. If the feme comes and will plead other plea than the baron pleads, or will confess, she shall not be received. Br. Baron and Feme, pl. 7. cites 33 H. 6. 43.

one plea and the feme another, and verdict for the plaintiff as to both issues, and damages intirely given; but judgment was arrested; because feme cannot plead by herself, and because damages intire were given, and repleader awarded. Cro. J. 239. pl. 3. Pasch. 8 Jac. B. R. Watton v. Thorp.

In action upon an assumption of the wife dum sola fuit, the plea was entered, viz. et prædict' J. N. & Bridgeta, ven. & defend. vim & injuriam, &c. & ipsa Bridgeta dicit quod ipsa non-assumpsit, & hoc, &c. et prædict' querens similiter. It was moved, that a plea of feme covert without the husband is no plea at all; and an issue being joined and tried thereupon was ill, and not aided by any statute of jeofails; and of that opinion was all the court, and a repleader awarded. Cro. J. 288. pl. 4. Mich. 9 Jac. B. R. Tampian v. Newson. — Yelv. 210. S. C. accordingly.

A. brought an action of battery against the husband and wife, and 2 others. The wife and one of the others, without the husband, pleads not guilty; and the husband and the other pleaded for assault demesne, and tried; and alleged in arrest of judgment, because the woman pleaded without the husband, and the judgment was staid, and a repleader alleged. Brownl. 235, 236. Trin. 14 Jac. Anon. And says, that this case was confirmed by a case which was between Yonges and Bartram.

In error of a judgment in battery against husband and wife, the husband and wife quoad the wounding pleaded not guilty. The wife quoad the battery justifies, and concluded with et hoc parata est verificare. The court much doubted whether it was good; for the husband ought to have joined with the wife in that plea, and would advise of it. Cro. C. 594. pl. 9. Mich. 16 Car. B. R. Watkinson v. Turner.

17. But the baron cannot forch by essoin, if the feme by covin of the plaintiff will appear; and if both wage their law, and the feme fails at the day, the baron shall be condemned. Br. Baron and Feme, pl. 7. cites 33 H. 6. 43.

18. In trespass of a close broken, the defendant said that the place where, &c. is one acre of land, of which he and Alice his feme were seised in their demesne, as of fee, before and at the time of the trespass, and the defendant entered and did the trespass; and exception was taken,

taken, because he did not say that they were seised in jure uxoris or jointly; & non allocatur; for per Fineux Ch. J. it is sufficient for the defendant to intitle himself to any part of the land, in whatsoever manner it be. Br. Pleadings, pl. 84. cites 12 H. 7. 24.

19. Feme covert shall not acknowledge acquittal in * *per que servitia*, and yet may acknowledge lease without impeachment of waste in *quid juris clamat*. Br. Coverture, pl. 84.

* Without examination, and examination does not lie

in this action. Br. Per que Servicia, pl. 13. cites Hill 5 E. 3. S. C.

20. A lease was granted to B. and J. his wife for a term of years. B. died, and J. married W. and in declaring upon this lease W. the plaintiff set forth that he and his wife were possessed; but did not say that they were possessed as in jure uxoris, as he ought, because it is a chattel real, and the feme surviving her baron shall have it, and not the executors of the baron, and therefore is not divested out of the feme. Sed non allocatur; for true it is that the baron and feme are possessed, and the manner how they are possessed is shewn, and so by considering the whole together, the manner of the possession appears, and consequently sufficient. Pl. C. 191. a. 1 Eliz. Wrottesley v. Adams.

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21. In debt against husband and wife he was outlawed, and his wife waived. Afterwards she pleaded the queen's pardon. The court held that she shall be discharged of her imprisonment; but the pardon ought not to be allowed, because she cannot sue out a scire facias against the plaintiff, to make him declare upon the original, without her husband; and there was a condition in the pardon, viz. ita quod ipsa stare recta in curia, which she could not do without her baron. D. 271. b. pl. 27. Hill. 10 Eliz. Anon.

22. Debt against husband and wife, upon a bond by the wife *dum sola*. After verdict it was moved, that the writ was in the *detinet only*, whereas it should have been in the *debet & detinet*; for the marriage was a gift in law of all the personal goods to the husband, and to his own use, and therefore debet the money due on this bond, as well as detinet. Quod fuit concessum per tot cur. 5 Rep. 36. a. Trin. 30 Eliz. B. R. Walcott's case.

3 Le. 206. pl. 263. Walcot v. Powell S.C. says that so is the Register 140.

23. Debt against husband and wife, for certain barrels of beer sold to the feme *dum sola* fuit. They both waged their law, and this term both did swear according to the form of the oath. Note, the husband did swear for the debt of the wife. Cro. E. 161. pl. 51. Mich. 31 & 32 Eliz. B. R. Weeks v. Holms.

24. Debt against J. and M. husband and wife, as executrix of her former husband. The defendants plead by attorney thus, et prædict' J. & M. and that after imparlance that they were divorced before the writ brought. It was adjudged that the writ should abate; for it shall be presumed the divorce continues, if the contrary be not shewn; but if they had said, et prædict' J. & M. uxor' ejus, it had been an estoppel. Cro. E. 352. pl. 6. Mich. 36 & 37 Eliz. C. B. Underhill v. Brook.

25. In a replevin the husband, being seised in right of the wife, awarded for damage *feasant in his own name*, and that the others are his

his servants, &c. and this was ruled to be good, without shewing that they were servants to the wife also. Noy 107. Hill. 1 Jac. C. B. Harvey v. Gulston.

Brownl. 209. 26. Trespass and assault against husband and wife, *supposing that they both beat the mare of the plaintiff.* Upon not guilty pleaded, the jury found that the wife only beat the mare. Williams and Crooke J. said that the verdict is against the plaintiff, because it appears that his action is false; for the husband is not joined in such case but for conformity only, and that there is a special writ in the Register to that purpose; and judgment was given against the plaintiff. Yelv. 106. Mich. 5 Jac. B. R. Drury v. Dennis.

where in battery against baron and feme the jury found the feme only guilty, and the court gave judgment for the plaintiff. Anon.—S. P. and judgment for the plaintiff; for per cur. they may find the one guilty and the other not, and there is no difference between this and other cases of different and several trespassors. Show. 350. Pasch. 4 W. & M. Dare v. White.—12 Mod. 19. S. P. per cur. accordingly, Hare v. White, S. C.—S. P. admitted by judgment, Cro. J. 203. pl. 3. Hill. 5 Jac. B. R. in case of Hales v. White.

In action brought against husband and wife, for words spoken by the wife, after a verdict for the plaintiff it was moved, that the writ was abated by the death of the husband * after the last continuance. The court doubted; but afterwards held that the suit is not abated by the husband's death, she being the only tortfeasor; but otherwise if she had died; and judgment accordingly. Hard. 151, 152. Pasch. 1659. in the exchequer, Brumrig v. Hanger.

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3 Bulst. 62. 28. Case, &c. against husband and wife, for scandalous words spoken by the wife. The defendants pleaded that *ipsi non sunt culpabiles*, and the jury found *quod ipsi sunt culpabiles*. It was moved in arrest, that the husband was joined only for conformity, and therefore they ought not to have said that *ipsi sunt culpabiles*, but that *ipsa est culpabilis*; and the verdict should have been so accordingly. But per Coke Ch. J. the plea of the husband is void, and if so, the verdict is good against the wife; and judgment for the plaintiff. Roll. Rep. 216. pl. 11. Trin. 13 Jac. B. R. Carpenter v. Welch.

where judgment was given accordingly in B. R. on the S. P. and afterwards affirmed in the exchequer chamber, the judgment given in C. B. in the principal case for the plaintiff, was now affirmed in B. R.—Cro. C. 417. pl. 5. Needler v. Symnell, S. P. and the issue that *non sunt inde culpabiles*, held well enough; for the baron and feme are charged as for the wrong of the feme.—Jo. 366. pl. 4. Mich. 11 Car. B. R. the S. C. but S. P. does not appear.—But Brownl. 6. Hill. 1 Jac. Smailes v. Belt, after verdict judgment was arrested, because the issue was *quod ipsi non sunt culpabiles*, and it ought to have been that the woman was not guilty.—S. C. cited accordingly, Hob. 126. at the end of pl. 156.—S. P. held accordingly in trover and conversion brought against baron and feme, for a conversion by the feme to her own use, and they pleaded the same plea. Cro. J. 5, 6. pl. 6. Pasch. 1 Jac. in the exchequer chamber, Cox v. Cropwell.—Noy 41. Cox v. Carpen, S. P. held accordingly, and seems to be S. C.—Cro. E. 883. pl. 18. Pasch. 44 Elis. B. R. Cox v. Crapnell, S. C. and S. P. held accordingly.

Hob. 93. to 101. pl. 127. 29. In *ravishment of ward* against baron and feme, the baron was acquitted, and the feme was found guilty, and judgment was given against the baron and feme. Upon argument by all the justices

S. C.—

2. Brownl.

justices it was unanimously agreed, that that judgment against baron and feme, where the baron was acquitted, ought not to be against a feme covert by the stat. Westm. 2. cap. 35. Cro. J. 413. pl. 2. Hill. 14 Jac. B. R. Hufley v. Moor.

59. 61.
S. C.—
9 Rep. 71.
b. S. C.

30. In debt against husband and wife, upon a bond of the wife, the defendants plead that *tempore confessionis*, &c. setting forth the day, she was covert baron, &c. The plaintiff confessed that it was so; but said that she made and sealed it in the morning of the same day in which she was married, and before the marriage; and upon a demurrer the plaintiff had judgment. 2 Roll. Rep. 431. Trin. 21 Jac. B. R. Jackson's case.

31. Case against husband and wife, for slanderous words spoken by the wife. The defendants pleaded *quod ipsi non sunt inde culpabiles*, and the jury found *quod ipsi sunt culpabiles*. It was moved in arrest of judgment, that it should have been *quod ipsi [ipse] non est inde culpabilis*. Sed non allocatur; for the husband is to pay the damages, and it may be either way, and the finding of the jury good. 2 Roll. Rep. 433. Trin. 21 Jac. B. R. Henborow v. Pooracre.

32. In battery against A. and his wife, for a battery done by the wife. And the pleadings was, that the baron and feme came and defended the force and wrong, &c. and the baron for his said wife says that she is not guilty; issue was joined thereupon, and found for the plaintiff, and in arrest of judgment, it was awarded that the issue was ill joined, for the wife there pleads nothing, so there was nothing done at that time with the suit. Het. 10. Pasch. 3 Car. C. B. Ayliffe's case.

Covenant against baron and feme as administratrix of Sir Geo. Smith, and the husband alone pleads, It is a discontinuance.

Freem. Rep. 351. pl. 439. Mich. 1673. Aylworth v. Fenn.

* [197]
S. P. but by 3 justices (absente Croke) if a feme acquires goods by gift or otherwise, they are immediately

33. In trover against husband and wife for certain goods, the plaintiff declared that they converted the goods *ad commodum suum proprium*. After verdict, it was moved that the declaration was not good, because * the joint conversion of goods during the coverture, shall be said the conversion of the baron and to his use; and judgment for the defendant. Jo. 264. pl. 3. Trin. 8 Car. B. R. Bullen's case.

the goods of the baron; yet there was an instant of time wherein, in priority, they were the goods of the feme, and *a posteriori* the property shall be divested out of her, and be veited in the husband; but they said they would confer with other judges; and afterwards it was adjudged by all the 4 justices for the plaintiff. Jo. 443. pl. 4. Mich. 15 Car. B. R. Hodges v. Sampson.

But *ibid.* in a note there at the end of the case, it seems that rule was given to stay the judgment.—Mar. 60. pl. 94. S. C. adjournatur.—*Ibid.* 82. pl. 134. Pasch. 17 Car. S. P. and seems to be S. C. says that the jury found the feme not guilty; and the court held this ill plea [count] made good by the verdict.

In trover brought by C. against P. and his wife. The declaration was, that the goods were found by the baron and feme, and were converted *ad usum suum*, whereas it ought to be in the plural number, to wit, *ad usum eorum*, or *ad usum* of P. and his wife; for as it was, it supposed the conversion to be made only by the husband, which is contrary to the action itself which is brought against both; upon this judgment was stayed till the other should move. Sty. 18. Pasch. 23 Car. B. R. Clark v. Few.—12 Mod. 247. Mich. 10 W. 3. in case of Hyde v. S. . . . Holt Ch. J. said, that though in declaration in trover against husband and wife laying the conversion *ad usum ipsorum*, judgment was arrested; yet if it came in question again, it should not be so by his consent.

34. In trespass and assault against a feme she impleads, and afterwards pleads that at the time of the bill she was covert, and concludes
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in bar; per cur. this is only a plea in abatement, and a respondeas ouster was granted, nisi. Keb. 822. pl. 110. Mich. 16 Car. 2. B. R. Becke v. Cavalier.

35. In *debt on obligation* feme covert may be aided on *non est factum*; per Wild J. which Rainsford agreed. 3 Keb. 228. pl. 40. Trin. 25 Car. 2. B. R. Cole v. Delawn.

36. In *assumpsit* against the baron the plaintiff declared upon several promises for *so many months lodging for his wife* at his request, and also for goods sold to himself. The defendant pleaded in bar, that long before the plaintiff had found lodging for his wife, she went from him without his consent, and lived in adultery, &c. and that the plaintiff had notice of her departure, and yet he provided her lodgings, and sold to her the wares and goods supposed in the declaration to be sold to the defendant, without any assent or notice of the defendant, and traversed that he promised *modo et forma*, prout, &c. And upon demurrer, the court, as to the special matter pleaded, gave no opinion, but seemed of opinion that this special matter would have been good evidence upon non-assumpsit pleaded; and that as to the lodging for the wife, the plea amounted to the general issue; but though it was a fault, yet it was cured by the demurrer. But because he did not answer to the *assumpsit* laid for the goods sold to himself, they were of opinion to give judgment for the plaintiff. The reporter adds a note, that as this pleading is, the absque hoc amounted to no more than a protestation. 2 Vent. 155. Pasch. 2 W. and M. in C. B. Beaumont v. Welden.

In replevin, &c. the avowant pleaded that he was seised of the tenements in fee in jure uxoris, and so avowed damagefeasant. The reporter says, note, that this avowry is not well pleaded, for it ought to be that baron and feme

37. *Trespass* against husband and wife for a trespass done by the wife alone; they both plead not guilty as to part, and as to the rest, they plead in bar that the husband was seised in fee in right of his wife, and being so seised, he demised it to the plaintiff for a year, and so from year to year rendering rent, and for so much in arrear the wife entered and distrained, et fuit inde possessionat' usque, &c. It was objected that the pleading that the husband was seised in his demesne as of fee in right of his wife was ill, for they are both seised in her right, and so are all the precedents; and further, that the declaration charges the wife only to be the trespassor, and yet they both as to all the trespasses præter, &c. have pleaded that they are not guilty, when it ought to be, quod ipsa is not guilty; and upon these exceptions the court gave judgment for the plaintiff clearly. 2 Lutw. 1421. 1425. Trin. 7 W. 3. Catlin v. Milner.

were seised in jure uxoris sue, and that so are all the precedents; but said that nothing was mentioned as to this matter. 2 Lutw. 1596. Hill. 9 W. 3. in case of Allen v. Baily.

[198] 38. *Trespass* against husband and wife; husband died, and sir Francis Winington moved in arrest of judgment; sed non allocatur; for wife may commit trespass along with husband. 12 Mod. 246. Mich. 10 W. 3. Hyde v. S....

39. In an action brought against the baron upon several promises made by the feme before coverture. The defendant pleads in bar that he and the woman, supposed in the declaration to be his wife, were never joined in lawful matrimony. The plaintiff demurs, and upon joinder in demurrer it was insisted that the plea admits a marriage de facto,

facto, which is sufficient to charge the husband with the wife's promises, and the loyalty of the marriage is not material. For the defendant it was said, that (*never lawfully married*) in common understanding is the same as (*never married*), and there are many precedents, where upon such plea issue has been joined to the country. But the court held clearly, that the plea was ill; for that in personal actions, the matter must be laid in the fact of the marriage, and not in the loyalty; and that though after issue joined and a proper trial per pais, the plea of the loyalty of the marriage cannot be objected to in arrest of judgment, yet the plaintiff is not bound to join issue upon it, but may demur if he will; and there was judgment for the plaintiff. MSS. Rep. Trin. 13 Geo. 2. B. R. Norwood v. Stevenfon.

(E. b) Damages and Costs. Where given for or against Baron and Feme both, or against one only.

1. *APPEAL* against baron and feme who were imprisoned, and the jury passed for them, by which they had two judgments; the one, that the baron should recover damages alone for himself, and the other, that the baron and feme should recover damages for him and the feme. Br. Baron and Feme, pl. 82. cites 12 R. 2. and Fitzh. Judgment, 108.

2. In *assise* by baron and feme the jury found for the plaintiffs, and that the goods of the baron were carried away. It was awarded that baron and feme recover seisin of the land, and damages of issues; and that baron alone recover for the goods carried away. Br. Damages, pl. 51. cites 11 H. 4. 16.

Br. Joinder in Action, pl. 98. cites S. C.—Br. Judgment, pl. 20. cites S. C.—

3. If husband and wife join in a writ of conspiracy, they shall recover damages together, as well as in trespass committed upon the land, or against the person of the wife, where they join in an action and are plaintiffs; so where they are defendants, judgment shall be given against them both. Quæ cohærent personæ, a persona separari nequeunt. Jenk. 28. pl. 53.

4. In case by baron and feme, for words spoke of the feme. The judgment was that the baron and feme recover. It was assigned for error, that the baron only is to have the damages, and therefore that judgment should be that the baron (only) should recover; but judgment was affirmed per tot. cur. Godb. 366. pl. 459. Hill. 2 Car. B. R. Litfield v. Melherse.

5. Error of judgment in waste against the tenant for years brought by baron and feme of moiety being seized in reversion to them and his heirs, because the damages are given to husband and wife, which per curiam is ill, and should have been amended in C. B. before the writ of error allowed; but now it is too late, and judgment reversed, nisi. 3 Keb. 175. Trin. 25 Car. 2. B. R. Curtis v. Brown.

2 Mod. 61. S. C. but S. P. does not appear.

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(F. b) Equity. Suits and Proceedings by and against them.

1. **T**HE court compelled husband and wife to *levy a fine*. Toth. 156. cites 2 & 3 Eliz. Barty v. Herenden.

2. The court doth decree a report, wherein it was thought fit that the defendant should compel his wife, and another man's wife, being the other defendant, to *levy a fine and join in assurance*. Toth. 158. Pasch. 8 Jac. li. B. Raft v. Whittle & al'.

3. The court compelled the wife to *levy a fine, and perfect assurances*. Toth. 157. cites Mich. Jac. Sands v. Tomlinson.

4. A *settlement by the wife on the baron* was by consent on a bill brought by the baron against the feme decreed, and there was *no fine or recovery*, or other legal act done to bind her, but the baron quitted some advantages he had on the wife's estate by former settlements, and gave her power to dispose of her real and personal estate by will; the wife died, and a long time after a bill of review was brought, but the court, assisted by judges, declared the decree good. 2 Ch. R. 46. 22 Car. 2. Earl of Castlehaven v. Underhill.

5. The wife's portion of 400l. was left in the hands of her brother, who gave a *bond to the baron to pay the interest to the baron and his feme during their lives*, and after the death of the survivor of them, then to pay the principal to such child as they should appoint; if no child, then the survivor to have the disposal thereof; the baron was grown poor, and prayed to have 200l. to buy him an office for subsistence, and the wife being examined apart, and consenting, the same was decreed. Fin. R. 365. Trin. 30 Car. 2. Brudenell and Orm v. Price.

6. P. the defendant gave bond to A. for 200l. A. died, and left E. his daughter legatee and executrix. E. married D. the plaintiff, and E. and D. brought a bill against P. for the 200l. P. owned the bond, but said she had paid 50l. in discharge of the said testator's debts, and thereupon had her bond delivered up to be cancelled, and the remaining 150l. was lent on a mortgage, and ready to be paid, with interest, as the court should direct, so as it may be preserved for the benefit of E. and not to be spent by her husband. The court ordered the said security to continue till the money be laid out, or otherwise secured for the wife, or till further order made. Fin. Rep. 377. Trin. 30 Car. 2. Davy v. Pollard.

7. A feme, infant, on the death of her brother, without issue, became intitled to the trust of lands in fee of 400l. per ann. and P. married her without her father's consent. The father brought a bill against P. and his wife, and trustees, setting forth as aforesaid, and that P. intended, when his wife should come of age, to make her *levy a fine, and sell the lands, and therefore prayed that a provision and settlement be made for her*. The defendants demurred, because
it

it appeared of the plaintiff's own shewing, that he had no right to the lands, either in law or equity, or any ways impowered to inspect the management of them. Ld. Chancellor allowed the demurrer; but said, that if P. had been plaintiff, to have the trustees transfer the estate, or to ask any other * favour of the court, he could then make him do what was reasonable. Vern. 39. pl. 37. Pasch. 34 Car. 2. Micoe v. Powell.

8. G. a man of mean fortune had married a woman who was one of two coparceners to 600l. per ann. The friends of the wife suggested lunacy, &c. but she was in court, and being thought sensible enough, the friends moved that the estate might be so settled, that she might not be wrought upon by her husband to give it him from her children by him or by any after-husband, which the court thought fit to order, and it was left to Mr. Pollexfen to see such a settlement made, and the court remembered the case of SIR EDWARD GRAVES. The settlement was to be to the husband and wife, and the longer liver of them, then to the issue between them, &c. with a power, in case of failure of issue, for the wife to dispose. Skin. 110. pl. 1. Trin. 35 Car. 2. B. R. Griffith's case.

9. A husband, as administrator to his wife, obtained a decree against the trustees to raise her portion, but he being a younger brother, having made no settlement on her, and having a son by her, the money was decreed to be raised, and put out for his benefit for life, then to the son for life, and if he leave issue, then for such issue; but if he dies without issue, and the father survives, he to have it. Abr. Equ. Cases, 392. Pasch. 1700. Wytham v. Crawthorn.

10. A. devised to B. his daughter, the wife of C. for her separate use, the surplus of his personal estate, and makes the wife, his daughter, executrix. Among other parts of the personal estate there was a mortgage from D. which C. her husband gave a † note under his hand that she should enjoy, and take the benefit of. By the note the husband, as to the mortgage and interest, has tied himself down. But Cowper C. thought, that, as to the surplus, it being devised to the wife, and not to trustees, when it comes to the wife it belongs to the husband, and what he has possessed by consent of the wife, there is to be no account for that, but reserved the consideration as to the surplus, whether it belongs to the husband, or to the wife for her own separate use. 2 Vern. 659. pl. 585. Trin. 1710. Harvey v. Harvey.

made by the husband to purchase and settle, though a bill was brought by a creditor of the husband by judgment for that purpose; for the court would not have decreed it to the husband, (had he brought a bill for the portion), without making some such settlement. Ch. Prec. 22. pl. 24. Pasch. 1691. Moor v. Rycault.

† A man stole a woman, whose portion was in trustee's hands, who would not part with it but on security to make a settlement of lands to be purchased with the money. The court will not sit aside an agreement

11. A. devised lands to his son and heir charged with his debts, and 2500l. legacy to his daughter at 21 or marriage, provided, if she marries in her mother's life-time, without her consent in writing first had, then 500l. part thereof, to cease, and be applied towards payment of debts. The daughter, after 21, marries unknown to her mother. There was sufficient, without this 500l. to pay all the debts. Ld. Keeper decreed the whole must be raised by sale of

Gilb. Equ. Rep. 26. Hill 9 Ann. S. C. in totidem verbis. — Skin. 288. Hill. 2 W. & M. in conc. in case of the Earl

of Salisbury
v. Bennet,
S. P. by Ld.
commission-
er Hutchins.

so much as is necessary, unless the defendant, the son, will otherwise secure the payment; but that the money, when raised, must be brought before the master, till the plaintiff, the husband, make some settlement on his wife, and for that purpose to bring his deeds before the master, to see what provision he can make for her. Chan. Prec. 348. pl. 256. Mich. 1712. King v. Wythers.

[201] (G. b) Where on a Bill by a Baron for the Wife's Portion the Court will decree a Settlement.

1. **T**HE defendant sued in the *ecclesiastical court* for a portion due to his wife; this court ordered an injunction to stay proceedings there, till he should make a competent jointure. Toth. 179. cites 14 Car. Tanfield v. Davenport.

2. The wife, an infant, was intitled to 500*l.* portion, besides lands of inheritance. On a bill by baron and feme for the portion, decreed the baron to make settlement on her suitable to her portion in money, though the lands of inheritance will descend to her issue. Fin. R. 361, 362. Trin. 30 Car. 2. How & Ux. v. Godfrey and White.

Gilb. Equ.
Rep. 1. S. C.
& S. P.—
2 Show. 282.
pl. 275. Hill.
34 & 35 Car.
2. in can.

3. When a baron sues here for his wife's fortune, the court will oblige him to make a settlement on her by way of jointure, or to secure a maintenance to her in case she outlives the baron; per Wright K. 2 Vern. 494. pl. 444. Pasch. 1705. in the case of Oxenden v. Oxenden.

Anon. S. P. and adds, but if he comes not into chancery as a complainant, they will never force him to settle, as if he sues at law, &c. but this is to be at the prayer of the wife's friends and relations to secure part to the feme, and part to the children; but where baron and feme demand the execution of a trust of a real estate in equity, which was devised for the benefit of the feme, it must be decreed according to the will; but where the husband comes for a personal demand in right of his wife, the court may impose terms on him; per Cowper C. 2 Vern. 626. pl. 558. Mich. 1708. Lupton & Ux. v. Tempest & al'.—Bill by baron and feme for his wife's fortune which was decreed, but the baron decreed not to meddle with the wife's portion till he had made a suitable settlement on her and her children. Fin. Rep. 145. Mich. 26 Car. 2. Shipton & Ux. v. Hampson & al'.

Chan. Prec.
367. pl. 258.
S. C. but
S. P. does
not appear.
—Gilb.
Equ. Rep.
31. S. C.
but S. P.
does not ap-
pear, and is
in totidem
verbis with
Chan. Prec.

4. Bill to have a satisfaction for their portions charged upon their father's lands by marriage settlement, and for a legacy given them by their father's will, &c. The case was, there was a trust term in a marriage settlement to raise portions for daughters, payable at their respective ages of 21, or day of marriage, with a proviso, if such daughter or daughters should happen to die before their age of 21 or day of marriage, then such daughter or daughter's portion not to be raised, but the trust term to attend the freehold and inheritance. The father gives by his will 500*l.* a-piece to his two daughters, the plaintiffs, payable in the same manner as their portions were to be paid by the said marriage settlement. Note, in this case one of the daughters married during her infancy, and it was ordered that her portion be raised, and brought before a master, there to remain until her husband should make a settlement suitable to her fortune; per Harcourt C. MS. Rep. Pasch. 12 Ann. in Canc. Greenhill v. Waldoe.

5. A feme

5. *A feme sole took a mortgage in fee for 800l. and married.* The master of the rolls held, that if the husband had sued in equity for the money, or had prayed that the mortgagor might be foreclosed, equity (probably) would not compel the mortgagor to pay the money to the husband without his making some provision for his wife, or at least upon her application to the court against the mortgagor and the husband, the court might prevent the payment of the money to the husband, unless some provision were made for her. Wms.'s Rep. 458, 459. Trin. 1718. Bosvil v. Brander.

6. *A feme being intitled to 4000l. portion after her mother's death, and for which no interest is payable in the mean time, and she having married a considerable tradesman, decreed, by consent of the feme, that baron might sell a moiety of the portion, or dispose of it as he thought fit.* 2 Vern. 762. pl. 662. Trin. 1718. Butler v. Duncomb.

10 Mod.
433. S. C.
but S. P.
does not ap-
pear.

7. *A. devised 1000l. to B. a feme sole, infant, payable after the death of the testator's wife, and at B.'s age of 20 years, if B. should so long live. B. at above 18 years, without her father's consent, married J. S. who soon after became bankrupt. The commissioners assigned the estate of J. S. and after he had his certificate and discharge, without any assignment having been made of his wife's possibility or contingent right to her portion. Afterwards the wife, by her next friend, brought a bill, setting forth how she was seduced into this marriage, and the husband's bankruptcy and discharge prayed that the money might be secured to her and her children, which the husband in his answer confessed, and submitted to; but prayed the arrears of interest, which was decreed him, deducting the costs, and the legacy ordered to be laid out in a purchase, and the wife in the mean time to have the interest for her separate use, &c. per Ld. C. Parker.* Wms.'s Rep. 382. 386. Mich. 1718. Jacobson v. Williams.

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8. *If husband sues in the spiritual court for a legacy left to the wife, chancery will grant an injunction to stay proceedings there, because that court cannot, but this court will, oblige him to make an adequate settlement on her.* Cited per Mr. Mead, as granted the last seal per Ld. Macclesfield. Ch. Prec. 548. pl. 339. Mich. 1720.

9. *Portions were given to daughters, provided they marry with consent of their mother.* They married without consent. Though this proviso is only in terrorem, and makes no forfeiture, yet upon the husband's applying to the court for payment of their portions, the master of the rolls ordered proposals to be made before the master as to the settling the money. Cases in Equ. in Ld. Talbot's Time, 212. Mich. 10 Geo. 2. Hervey v. Ashton.

10. *Ld. C. King said, he thought it extraordinary that chancery should interpose against the husband, in cases where the law gives him a title to the wife's personal estate, and doubted it had done more harm than good, unless where the husband appeared profligate or extravagant.* 2 Wms.'s Rep. 642. Mich. 1731. in case of Milner v. Colmer.

11. *And therefore where A. pending an account for a great personal estate, married an infant intitled to a large share thereof,*

Baron and Feme.

viz. 14000*l.* applied to the court for his wife's portion, and being sent to a master to make proposals as to what he would settle, and he offering to settle 4000*l.* part of the 14000*l.* portion, and to covenant that in case his elder brother, who had then no issue, and who probably would have no issue by his then wife, who lived separate from him, should die without issue male in A.'s life-time, to settle 500*l.* a-year of the family estate of 1000*l.* a-year upon her for a jointure; and alleging that he being in trade, and a freeman of the city of London, the custom of the city was alone a provision for her. *Ld. C. King*, after examination of the wife in court as to her consent, which she gave, and likewise her reasons for it, he recommended it to A. to add to his proposals, but A. answering that he could not conveniently do it, his lordship directed that the defendant entering into such covenant, should be paid the residue of the portion beyond the 4000*l.* which was to be invested in land, and settled as above. 2 *Wms.'s Rep.* (639) *Mich. 1731. Milner v. Colmer.*

The reporter adds, N. B. This was the case only of a personality.

—The same was observed by the *Ld. Chancellor*, that it was only of a personality, and somewhat particular. *M.S. Rep. in S. C.*

12. The lady Shovel devised 4000*l.* in trust for the separate trust of a feme covert. The husband and wife brought a bill against the trustees to have the money paid them; and though she herself was in court, and consented that the money should be paid to her husband, yet the master of the rolls would not decree it, but dismissed the bill. Cited in the case of *Penne v. Peacock*, *Mich. 1734.* Cases in *Equ. in Ld. Talbot's Time*, 43. as the case of *Blackwood v. Norris.*

[203] (H. b) Equity. In what Cases Equity will order the Husband to enforce or procure the Feme to do an Act.

See (F. b)

1. ORDERED, that the baron become bound in a recognizance that his wife shall release her right. *Toth. 158. cites 4 & 5 E. 6. Vaux v. Gleas.*

2. The defendant's wife would not bring in evidences according to an order, wherefore the husband was bound that she should do it. *Toth. 170. cites 4 Eliz. King's Coll. in Cambridge v. Ragland.*

3. The court ordered a man to procure his wife to acknowledge a fine of mortgaged lands, *Toth. 171. cites 3 & 4 Car. Griffin v. Taylor.*

The defendant by his answer admits the covenant, and is ready to levy a fine himself, but says his wife refuses to join with him, and he can-

4. Husband and wife did, upon a valuable consideration, by lease and release, convey the wife's land in fee, and covenanted that the wife should levy a fine of the same to the use of the purchaser. The wife refused to levy a fine. The plaintiff brought his bill to have his title perfected by a specific performance of the covenant; and a precedent was cited where a specific performance had been decreed in the like case; but the chancellor would not decree a specific performance in this case, because upon such decree the husband could not compel his wife to levy a fine, and

If she would not comply, imprisonment would fall upon the husband for contempt, which was the ill consequence of the decree in the said cited case. MS. Rep. Mich. 4 Geo. in canc. Othead v. Round.

not persuade her to do it.
Per Cowper C. it is a tender point to compel

the husband by a decree to procure his wife to levy a fine, though there has been some precedents in this court for it; and it is a great breach upon the wisdom [of the law], which secures the wife's lands from being aliened by the husband without her free and voluntary consent, to lay a necessity upon the wife to part with her lands, or otherwise to be the cause of her husband's laying in prison all his days; and said he did not think it proper in this case to decree a specifick performance of the covenant, but the defendant must refund the purchase-money paid to him with costs. In another MS. Rep. Mich. 4 Geo. in canc. Outram v. Round. S. C.

(L. b) Offences and Crimes done by the Feme, or her and Baron. What and how punishable.

1. *FEME* was arraigned of felony, and was covert baron, and *would have confessed by command of the baron, and the court would not take it for pity, but charged the inquest, who said that she did it by coercion of her baron in spite of her teeth, by which she went quit; and it was said that the command of the baron, without other coercion, shall not make felony. The reason seems to be, inasmuch as the law intends that the feme, who is under the power of her baron, durst not contradict her baron.* Br. Corone, pl. 108. cites 27 Aff. 40.

It was pronounced to all the judges, if a man and his wife go both together to commit a burglary, and both of them break a house in the night, and steal

goods, what offence this was in the wife? and agreed by all, that it was no felony in the wife; for the wife being together with the husband in the act, the law supposeth the wife doth it by coercion of the husband, and so it is in all larcenies; but as to murder, if husband and wife both join in it, they are both equally guilty. See Fitzh. Corone 160. 27 Aff. pl. 40. Fitzh. Corone 199. Poulton de Pace 126. b. And the case of the Earl of Somerset and his Lady, both equally found guilty of the murder of Sir Thomas Overbury, by poisoning him in the Tower of London. Kel. 31. 16 Car. 2. Anon.

* The feme may commit felony, if it be not by coercion of the husband; per cur. 12 Mod. Mich. 30 W. 3. in the case of Hyde v. S. . . .

* [204]

2. A feme covert commits felony. Appeal shall be brought against her without her husband, because it concerns life; but otherwise where it does not concern life, as if she commits trespass. Jenk. 28. pl. 53.

3. The husband shall not answer for damages given in a criminal matter, as in an information for suppressing a will; though for civil offences it is otherwise, as battery, slander, or assumpsit by feme covert. Noy 103, 104. Trin. 12 Jac. Brereton v. Townsend.

4. Where debt was brought against the husband and wife for the recusancy of the wife, the husband would have appeared by superseatas alone; but the court resolved, that either both must appear, or both be outlawed. Hob. 179. pl. 209. Loveden's case.

5. At the sessions at the Old Bailey the 7th of December 1664, one Jane Jones, together with one Thomas Wharton, were indicted for burglary, and she pleaded herself to be married to Wharton, on purpose to be excused, being with her husband at the burglary; and she refused to plead by the name of Jones, and thereupon we called



called for the jury, which found the indictment, and in their presence, and by their consent, we made the indictment as to her name to be *Jane Wharton, alias Jones*; but we did not call her *Jane Wharton, the wife of Thomas Wharton*, but gave her the addition of *spinster*, and then she pleaded to it; and the court told her, that if upon her trial she could prove she was married to Wharton before the burglary committed, she should have the advantage of it; but on trial she could not prove it, and so was found guilty, and judgment given upon her. Kel. 37.

2 Keb. 468. pl. 56. Hill 20 & 21 Car. 2. S. C. the court seemed of opinion, that the husband should be joined; sed adjournatur. —Ibid.

479. pl. 15. Pasch. 21 Car. 2. S. C. the court said, that the wife may as well ingross and sell, as convert or eject, which must be actually proved against her; but in this case she was indicted by the name of F. Spinster, alias dict' the wife of such an one; the court agreed, that the addition is never put in the alias dict', but all conceived, that after verdict she may be intended a single woman, the alias dict' being usual, and does not necessarily imply that she was a wife, but so called, and judgment pro rege, nisi. —Ibid. 501. pl. 69. S. C. The court held, that the alias dict' is nothing, and the verdict has found her guilty, which they could not do, were she a feme covert; and judgment pro rege, and after she was fined 15s. the value, &c.

7. Where the husband and wife use the same trade, as selling of ale, &c. she does it as servant, and he alone shall be indicted. 2 Keb. 583. pl. 122. Mich. 21 Car. 2. B. R. Moreton v. Packman.

8. Husband and wife may be found guilty of *nuisance, battery, &c.* and the reason why in *burglary, larceny, &c.* she is excused, is, *because* she could not tell what property the husband might claim in the goods. Arg. 10 Mod. 63. Mich. 10 Ann. B. R. in case of the Queen v. Williams.

9. Husband and wife were indicted for keeping a *bawdy-house and procuring lewdness*. The court held the indictment good, and said, that keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband. 10 Mod. 63. Mich. 10 Ann. B. R. The Queen v. Williams.

1 Salk. 384. pl. 35. S. C. resolved accordingly. — 10 Mod. 335. S. C. cited per cur. that the indictment was held good. — 10 Mod. 63. cites Hill. 2 Ann. COOK'S CASE, S. P. and that the husband was fined, and the wife set in the pillory.

[205] 10. Husband and wife were indicted for keeping a *common gaming-house*, and held good, and compared it to the case of the QUEEN v. WILLIAMS; for as there the wife may be concerned in acts of bawdry, so here she may be active in promoting gaming, and furnishing the guests with all conveniences for the purpose, 10 Mod. 335. Trin. 2 Geo. 1. B. R. The King v. Dixon,

(K. b) What the Wife shall have in Case of a Divorce.

1. If a man gives in tail to baron and feme, and they have issue, and after divorce is sued, now they have only franktenement, and the issue shall not inherit; for it was once possible that their issue might inherit. Br. Taille and Dones, &c. pl. 9. cites 7 H. 4. 16. per Thirn. J. And when in such case divorce was had *contra voluntatem* of the feme, they shall hold jointly for their lives, and survivor shall hold all, and therefore it seems it is only a jointnancy for life, and the inheritance is gone. Br. Deraignment, &c. pl. 15. cites 13 E. 3.

2. If a man is bound to a feme sole, and after marries her, and after they are divorced, the obligation is revived. Br. Coverture, pl. 82. cites 26 H. 8. 7. per Fitzherbert and Norwich J. Br. Deraignment, pl. 1. cites S. C. and she may have action

again, though it was once suspended. But Brooke says, quare inde. — S. C. cited and agreed by Holt Ch. J. because the divorce being a vinculo matrimonii, by reason of some prior impediment, as precontract, &c. makes them never husband and wife ab initio; but if the husband had made a *seffment in fee of the lands of his wife*, and then the divorce had been, that would have been a discontinuance as well as if the husband had died, because there the interest of a third person had been concerned, but between the parties themselves it will have relation to destroy the husband's title to the goods, and it proves no more than the common rule, viz. that relation will make a nullity between the parties themselves, but not amongst strangers. *Ld. Raym. Rep. 521. Hill. 11 W. 3.*

3. The feme, after divorce, shall re-have the goods which she had before marriage. Br. Coverture, pl. 82. cites 26 H. 8. 7. by Fitzherbert and Norwich. But if he had given or sold them without collusion before

the divorce there is no remedy; but if by collusion she may *aver the collusion*, and have *deinue* of the whole, whereof the property may be known, and as for the rest which consists of money, &c. she shall sue *in fee of the spiritual law*. Br. Deraignment and Divorce, pl. 1. cites 26 H. 8. 7. — Br. Extinction, pl. 1. cites S. C. — S. P. and prohibition does not lie. Br. Deraignment, pl. 17. cites F. N. B. tit. Prohibition. But Brooke adds a quare, if the property had been altered by sale or otherwise before the suit commenced.

4. If land be given in frank-marriage, and donees are divorced, which of them first moves for the divorce shall lose the land; per Shelly. But by Fitzherbert, the land shall be divided between them, cited D. 13. pl. 62. Trin. 28 H. 8.

in advancement of her. *Kelw. 104. b. pl. 12. Casus incerti temporis.* — The divorce was at the suit of the feme, and the baron continued always in possession, and died, and after the wife died, and the feme was adjudged always in possession, because there never was any debate [or contest] by her [about the same]. Br. Deraignment and Divorce, pl. 7. cites 12 Aff. 22. — The Year-book of this case is, that the land was given in frank-marriage by the father of the wife, and that they had issue, and that it was adjudged for the issue against the cousins and heirs of the baron; and that no debate happening between the baron and feme about the tenements, she was adjudged to be always tenant of the franktenement; whereas had any debate been, then the baron had been disseisor, and the freehold had descended to his heirs, of which they would not have been oustable by any.

And where in assise it was found that the father of the feme gave the tenements to the feme and her baron in frank-marriage, when they were *infra annos nobiles*, and at their full age the baron at his suit was divorced by the grace of the feme, and after he held himself in of the whole, and ousted the feme, and brought assise, and because she was the cause of the gift, which was determined by the assise and suit of the baron, therefore the feme recovered the whole. Br. Deraignment and Divorce, pl. 8. cites 19 Aff. 2. — Br. Assise, pl. 407. cites Pasch. 19 E. 3. and Fitzh. Assise, 83. S. P.

So where land was given to the baron and feme in tail, remainder to the right heirs of the baron, and a divorce was had at the suit of the baron, who held out the feme, and she brought assise, and recovered the whole, because the divorce was at the suit of the baron. Br. Deraignment, &c. pl. 16. cites 8 E. 1. and Fitzh. Assise, pl. 415. and 83. Pasch. 19 E. 3. — Br. Assise, pl. 437. cites 8 E. 3. and Fitzh. Assise, pl. 415. S. P.

† [206]
Per Keble, the wife shall have the land, because it was given

5. If the baron and feme purchase jointly and are disseised, and the baron releases, and after they are divorced, the feme shall have the moiety, though before the divorce there were no moieties; for the divorce converts it into moieties. Br. Deraignment, pl. 18. cites 32 H. 8.

If after such alienation and divorce the baron dies, she is put to her *cui in vita ante divortium*, and yet the words of the statute are, that such alienation shall be void, but this shall be intended to toll the *cui in vita*. Mo. 58. pl. 164. Pasch. 8 Eliz. Broughton v. Conway.

6. If baron alien the wife's land, and then is a divorce præcontractus, or any other divorce which dissolves the marriage a vinculo matrimonii, the wife during the life of baron may enter by statute 32 H. 8. 28. D. 13. pl. 61. Marg. cites 8 Rep. 73.

7. Obligor or obligee marry with the party, and after are divorced causa præcontractus, the debt is extinct. D. 140. pl. 39. Hill. 3 & 4 P. & M.

All the justices held that the books which say that the feme shall

8. After divorce the wife shall have such goods as were hers before marriage, and are not spent. D. 13. pl. 63. by Fitzherbert, and says, that so was the opinion of the court about the 26 H. 8. Kelw. 122. b. pl. 75.

have her goods again after divorce, are to be intended of an absolute divorce *ab initio*. Cro. E. 908. pl. 19. Mich. 44 & 45 Eliz. B. R. Stevens v. Totty.

If the husband alien or sells his wife's goods by *covin*, and after they are divorced, the wife may aver the *covin* and shall re-have her goods; per cur. Br. Collusion, &c. pl. 2. cites 26 H. 8. 7.

But after arguments by the civilians Popham said, that a consultation

9. Divorce causa adulterii of the husband; afterwards the wife sues in the spiritual court for a legacy; the executor pleads the release of the baron; the * release binds the wife, for the vinculum matrimonii continues. Cro. E. 908. pl. 19. Mich. 44 & 45 Eliz. B. R. Stephens v. Totty,

shall be granted, (so they in the spiritual court admit that plea), and Dr. Crompton said, that then it is clear that the wife there shall recover. Noy 45. Stephens v. Tutty & Ux. S. C. — 1 Salk. 115. pl. 4. — Mo. 665. pl. 910. S. C. says, that consultation was awarded, but so as that the ecclesiastical judge should not disallow the release. * For here the legacy is originally due to the baron and feme, and it is a real interest, and for that reason the release of the baron will discharge it. See Prohibition (Q) pl. 11. cites 44 El. B. R. Stephens v. Tott.

5 Mod. 71. S. C. accordingly. — 12 Mod. 89. Chamberlain v. Huetson, S. C. accordingly, and says that the reason of Motam's case, 2 Roll.

10. Husband may release costs adjudged to the wife suing in the spiritual court, notwithstanding a divorce *a mensa et thoro*; but if such divorce be, and the wife has alimony, and she sues there for defamation, &c. the husband cannot then release the costs; for these costs come * in lieu of what she has spent out of her alimony, which is a separate maintenance, and not in the power of the husband. 1 Salk. 115. Hill. 7 W. 3. B. R. Chamberlain v. Hewson.

Abr. 301. though not mentioned, was because she had alimony; per Holt Ch. J. but he held, that if such feme covert after such divorce sues for a legacy, which, if recovered, comes to her husband, there the husband may release it, because there is no alimony; and if he may release the duty, he may release the costs. — 1 Salk. 115. pl. 4. S. C. and S. P.

* Prohibition (Q) pl. 1. cites 14 Ja. B. Motam v. Motam.

17. A divorce was *a mensa & thoro*, and then the husband dies intestate. The wife by bill prayed assistance as to dower and administration, (it being granted to another,) and distribution. The master

master of the rolls bid her go to law to try if she was intitled to her dower, there being no impediment, and as to that dismissed the bill; and as to the administration, the granting that is in the ecclesiastical court; but the distribution more properly belongs to this court; but since in that court she is such a wife as *is not intitled to administration*, he dismissed the bill as to distribution too, and said if they could repeal that sentence, she then would be intitled to distribution. Ch. Prec. 111. pl. 99. Pasch. 1700. Shute v. Shute.

(L. b) What Alteration a Divorce makes in the Estate.

1. **L**AND was given to baron and feme in *frank-marriage*, and after a divorce was had between them *at the suit of the feme*, and yet it was said that the feme remained tenant always. Br. Estate, pl. 55. cites 12 Aff. 22. Br. Deraignment, pl. 7. cites S. C.

2. *Things executed*, where baron is seised in right of the wife, shall not be *avoided* by divorce, as *waste, receipt of rent, seisor of ward, presentment to a benefice, gift of goods, of the wife, &c.* But otherwise it is in matter of inheritance, as if baron discontinues or charges land of his wife, releases or manumits villeins, &c. Br. Deraignment, &c. pl. 18. cites 32 H. 8.

3. Feme sole leases for years; *lessee does waste, and after marries the feme.* They are divorced. Whether the action of waste shall *revive* to the feme? Kelw. 122. b. pl. 75. Anon. *Casus incerti temporis.*

4. If feme holds of me, and *ceases*, and after I marry her, upon a divorce the action is *revived*. Arg. Kelw. 122. b. pl. 75. *Casus incerti temporis.*

5. After a divorce a *mensa & thoro*, an *injunction* was moved for to stop the husband from *selling a term of the wife's*. The court at first thought it should not be granted; for that the marriage continued, and the husband had the same power over it as before the divorce. But upon the importunity of the plaintiff's counsel it was granted; for though the marriage continues notwithstanding the divorce, yet the husband does nothing as husband, nor the wife as wife. 9 Mod. 43, 44. Trin. 9 Geo. Anon.

(M. b) Actions by or against the Baron and Feme after Divorce. In respect of the Feme.

1. **I**T seems that *writ brought against baron and feme shall abate by divorce* made between them pending the writ. Thel. Dig. 185. lib. 12. cap. 13. f. 1. cites Pasch. 6 E. 3. 249. and that so it is held Pasch. 25 E. 3. 39.

2. Trespass

Baron and Feme.

2. Trespass de muliere abducta, and ravished; cum bonis viri asportatis, against baron and feme and others, and well against the feme; for a feme may assent and aid to the ravishment of another feme, and may carry away the goods; and thete it is agreed, that it is no plea that the * plaintiff and his feme are divorced; for he is not to recover the feme, but damages; and if she was feme at the time, &c. this is sufficient. Br. Trespas, pl. 43. cites 43 E. 3. 23.

S. P. Br.
Rape, pl. 3.
cites 43 E.
3. 23.

3. N. K. brought trespass against R. and his feme, and two others, in B. R. of ravishing his feme and carrying away his goods, and all came into B. R. by capias in ward of the sheriff, and the plaintiff counted of a rape of his feme, and carrying away his goods, and protection was shewed forth for R. which was allowed for him and his feme, and the other demanded judgment of the writ, because N. and the feme are divorced. Per Knivet J. if the feme was dead, yet action lies of the ravishment, and the same of divorce; for he shall not recover the feme, but damages; and it was said that the divorce was causa frigiditatis; and per Knivet, then he may recover his nature, and act as a man, and re-have his feme, therefore answer. Kirton said, the action is brought against R. and his feme, and feme cannot ravish a feme; judgment of the writ, & non allocatur; for she may assent, or be aiding, or carry away the goods, by which he pleaded not guilty. Br. Rape, pl. 2. cites † 44 Aff. 12.

† This is
misprinted,
and should
be 44 Aff.
pl. 13.

For more of Baron and Feme in general, see Abatement (N. a). Amercements (M) (C. a) (D. a). Appeal (A). Copyhold. Costs (A), pl. 1. Damages (E). Default (O). Emblements. Error (K). Evidence. Execution (P) (Q. 3) (R) (T). Executor. Feme (A) (B). Fines (T) (B. b) (C. b), &c. Marriage. Re unques Accouple. Kent (C. a). Receipt (I) (L) (M. 2), &c. Reservation (N). Usury (B. a). Waste (R) (Y) (Z), &c. and other proper titles.

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Barretors.

(A) Of Barretors in general, and their Punishment.

[1. EDW. 3. cap. 15. [16] conservators of the peace, who are not barretors, shall be assigned in every county.]

[2. 34

[2. 34 Ed. 3. cap. 1. justices of peace shall *have power to restrain* the offenders, rioters, and all other barretors. 2 R. 2. cap. 7.] A justice of peace may arrest any common barretor, and

put him in ward till he finds security for his good behaviour for the future, &c. by this statute. Kelw. 41. in pl. 6. per Keble, and agreed by the court. Mich. 7 H. 7. Anon.

Justices of peace have authority to enquire and hear it, *without any special commission* of oyer and terminer, and their commissions are equal to that purpose. Cro. J. 32. pl. 4. Trin. 2 Jac. B. R. Barnes v. Constantine. —Yelv. 46. S. C. & S. P. held accordingly. —Sid. 334. pl. 20. Pasch. 19 Car. 2. B. R. the S. P. admitted in case of the King v. Browne. —2 Keb. 212. pl. 49. and 226. pl. 81. S. C. & S. P. admitted.

Barretty is an offence of a mixed nature, of which *justices of peace cannot hold plea* by virtue of their commission of the peace; but this ought to be by another power. 2 Roll. Rep. 151. Hill. 17 Jac. B. R. Anon. —Hawk. Pl. C. 244. cap. 81. f. 8. cites S. C. says it seems, from the words of the statute, that justices of peace (as such) have cognizance of barretty without any other commission; but quære.

3. A. acquitted of being a common barretor, threatening the witnesses to carry them into the star-chamber, and appearing to the court to be a notable knave, was *bound to his good behaviour*. Lat. 5. Pasch. 1 Car. Toplin's case. [209]

4. Common barretty is an *offence against divers statutes*, viz. maintenance, and the like; per cur. Cro. C. 340. pl. 4. Hill. 9 Car. B. R. Chapman's case.

(A. 2) Who shall be said a Barretor.

[1.] If a man *prosecutes an infinite number of suits*, which are his own proper suits against others, yet he *shall not be a barretor* by this; for if they are false, the defendants shall have costs against him; and if such person shall be a barretor, then he that sues for cause may be comprehended; *but he that stirs up suits among his neighbours* is a barretor. Mich. 11 Jac. B. R. SOME'S CASE, per cur.] Hawk. Pl. C. 243. cap. 81. f. 3. S. P. but says that if such actions be merely groundless and vexatious, without any manner of colour, and brought only with a design to oppress the defendants, he does not see why a man may not as properly be called a barretor for bringing such actions himself, as for stirring up others to bring them.

2. A barretor is a *common mover* and exciter or maintainer of suits, quarrels, or parts either in courts or elsewhere in the country. In courts, as in courts of record, or not of record, as in the county, hundred, or other inferior courts in the country, in 3 manners. 1st, *In the disturbance of the peace*. 2dly, *In taking or keeping of possessions of lands in controversy, not only by force, but also by subtilty and a deceit*, and most commonly in suppression of truth and right. 3dly, *By false inventions, and sowing of calumniation, rumours and reports, whereby discord and disquiet may grow between neighbours*. Co. Litt. 386. a. b. 8 Rep. 36. b. Pasch. 30 Eliz. the case of barretty, S. P.

3. A *feme covert* was indicted as a common barretor, but the indictment was quashed. 2 Roll. Rep. 39 Trin. 16 Jac. B. R. Anon. Hawk. Pl. C. 243. cap. 81. f. 6. cites S. C. and says it seems to have been holden, that a *feme covert* cannot be indicted as a common barretor, but this opinion seems

seems justly questionable; for since a feme covert is as capable of exciting quarrels, in the frequent repetition whereof the notion of barrettry seems to consist, as if she were sole, why should she not as properly be indicted for it?

4. Common barretor is *as much*, as Twifden J. said he had heard judges say, *as common knave*, which contains all knavery. Mod. 288. pl. 34. Trin. 29 Car. 2. B. R.

5. A man may *lay out money* in behalf of another in suits of law to recover a just right, and this may be done in respect of the *poverty* of the party; but if he lends money *to promote* and stir up suits, then he is a barretor. 3 Mod. 98. Hill. 1 Jac. 2. B. R. Anon.

Hawk. Pl. C. 243. cap. 81. f. 4. cites S. C. and says it seems so. 6. If an *action be first brought*, and then another prosecutes it, he is no barretor, though there is no cause of action. 3 Mod. 98. Hill. 1 Jac. 2. B. R. Anon.

(B) Pleadings and Proceedings.

Hawk. Pl. C. 244. cap. 81. f. 10. says, that it seems to be certain that an indictment of battery, concluding *contra formam statuti*, is good, though no statute be made directly against it, but only for the punishment of it, supposing it an offence at common law.

* [210]

† No certain place need be expressed, for it must be intended in several places. Cro. J. 427. pl. 4. 2. A. was indicted, that at such a day, and divers days before and after he was a common barretor and perturbator pacis, but shewed *no place where* nor *cause* for which he is a common barretor; but per cur. it is good, and the trial shall be de corpore comitatus, for it is in every place. Cro. E. 195. pl. 11. Mich. 32 & 33 Eliz. B. R. Parcell's case.

Pasch. 17 Jac. B. R. Palfry's case. — As to no place being alledged. Doderidge J. said, that if he is a barretor in one place, he is so in all places; but the indictment being per quod, he did stir up jurgia contentions, and no place alledged where he did stir them up, it was said that in such case the place was very material, and for that reason it was quashed. Godb. 383. pl. 471. Pasch. 3 Car. B. R. Man's case. — Palm. 450. S. C. the indictment was quashed, because no place was alledged where he was a barretor, nor where he stirred up suits; yet at first Doderidge said it was good, because a barretor is one that stirs up suits between his neighbours, and if he is a barretor in one place, he is so throughout the whole county; but here if it be traversed, no venire facias can be awarded, and therefore it was quashed. — Lat. 194. S. C. in totidem verbis with Palm. — An indictment of barrettry charged the defendant for the multiplicity of his own suits at such a place, and for raising of others to suits. Exception was taken to the indictment that no place was alledged; but Coke Ch. J. held it well enough, because the word (et) couples all together, and therefore it shall be intended to be at the same place. Roll. Rep. 295. pl. 12. Hill. 13 Jac. B. R. The King v. Wells. — 2 Keb. 409. pl. 33. Mich. 20 Car. 2. B. R. The King v. Clayton, S. P. held good without saying where. — Hawk. Pl. C. 244. cap. 81. f. 11. says it has been holden, that an indictment of this kind may be good without alledging the offence at any certain place, because from the nature of the thing consisting in the repetition of several acts, it must be intended to have happened in several places, for which cause it is said that a trial ought to be by a jury from the body of the county. — But it had been resolved, that such an indictment is not good without concluding *contra pacem*, &c. for this is an essential part of it. Hawk. Pl. C. 244. cap. 81. f. 12. — a Hawk. Pl. C. 227. cap. 25. f. 61. S. P.

3. An

3. An indictment of barrettry at the sessions of the peace, may be tried the same day of the indictment found. Judged and affirmed in error. The barretor was fined 40l. and imprisoned. Jenk. 317. pl. 9.

Cro. J. 404. pl. 2. Trin. 14 Jac B. R. Rice v. Regem.

4. Indictment for barrettry omitted the words *contra pacem domini regis, vel contra formam statuti*. Exception was taken for these causes, and it was held to be insufficient, it being an essential part of the indictment; and therefore was reversed. Cro. J. 527. pl. 4. Pasch. 17 Jac. B. R. Palfrey's case.

Indictment was, that he was a common barretor, contra formam diversorum

statutorum. Exception was taken that it was not good, because it is an offence at common law, and there is not any statute to punish it, sed non allocatur; for so is the common course of indictments. Besides common barrettry is an offence against divers statutes, viz. maintenance, and the like. Cro. C. 340. pl. 4. Hilf. 9 Car. B. R. Chapman's case. — Barrettry was an offence at common law, yet it is good to conclude contra formam diversorum statutorum; per cur. obiter. 12 Mod. 99. Trin. 8 W. 3. in case of the King v. Bracy.

5. An attorney, upon barrettry being proved against him by divers affidavits read in court, had judgment to be put out of the roll of attorneys, and be fined 50l. and turned over the bar, and stand committed. Sty. 483. Trin. 1655. B. R. Alwin's case.

6. An indictment of barrettry was brought into this court and filed. Upon a motion for a procedendo, Twisden J. said that it could not be; for a record filed here cannot be removed without an act of parliament. But by the opinion of Foster and Windham, a procedendo was granted. Quære de ceo. Lev. 23. Hill. 14 & 15 Car. 2. B. R. Upham's case.

Sid. 108. pl. 21. The King v. Up-ton, S. C. says the clerk of the crown informed the court that it

was filed, and therefore could not be remanded; but because it appeared to the court to be done by practice, and the offence to be great, they awarded a procedendo contrary to the opinion of Twisden, and likewise to the course of the court. — Keb. 470. pl. 80. S. C. says it was filed the same day that the certiorari was returned, which the court conceived an irregular surprize, notwithstanding the bar, and the clerks affirmed that after filing none could issue.

7. Error assigned to reverse a judgment in an indictment for barrettry, was because it is that he shall be fined 100l. and be of the good behaviour, without saying how long, and so uncertain; but the record was that he should be fined. Et ulterius ordinatum est, that he shall be of the good behaviour; and therefore the court held that the good behaviour, as it is here entered, is no part of the judgment; but they seemed to doubt if it had been entered in apt words, whether such uncertainty would not have hurt the judgment. Sid. 214. pl. 14. Trin. 16 Car. 2. B. R. The King v. Rayner.

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Keb. 755. pl. 57. S. C. says the et ulterius ordinatum est is well enough, it being no part of the judgment, but the judgment is complet without it; and judgment affirmed.

8. U. was indicted at the assizes of common barrettry, which being removed into B. R. by certiorari, he appeared and pleaded not guilty, & de hoc ponit se super patriam, & Thomas Fanshawe Miles, coronator & attorn' domini regis, &c. and found guilty de premissis in indictmente infra specificato interius ei imposuit modo & forma prout præd' T. F. interius versus eum quer'. It was moved in arrest, that the verdict was insufficient, because the defendant is not found guilty generally, but only that he is guilty modo & forma prout præd' T. F. versus eum queritur, whereas in fact the said Sir T. F. had

not complained against the defendant; for this was not an information exhibited in this court by the said Sir T. F. but an indictment in the country; and the said Sir T. F. did only join issue for the king, which, if the indictment had remained in the country, the clerk of the assises ought to have done, and this fault was not aided by any statute of jeofails, because this case was excepted out of all the statutes of jeofails, and thereupon cur. advisare voluit; but afterwards the court over-ruled the exception, and adjudged the verdict sufficient, because the words modo & forma, &c. was mere surplusage; for the defendant is found guilty de premissis in indict' infra specificato interius ei imposit', which is a compleat verdict of itself without saying more, and the subsequent words are merely a void surplusage; wherefore judgment was given against the defendant. But because it seemed to the court to be a malicious prosecution, which had been for a long time, viz. 7 years, a small fine was set on the defendant. 2 Saund. 308. pl. 52. Trin. 17 Car. 2. The King v. Urlyn.

2 Keb. 42. pl. 84. S. C. — The words (communis barretator) in ancient indictments were material to be inserted where they were of barretrey. 8 Rep. 37. b. Pasch. 30 Elis.

9. H. was indicted at the sessions, and judgment was there given against him that he was a promoter of suits, and a common oppressor of his neighbours, and was fined 200l. The justices all agreed that the indictment was not good without the word (barretor); and their great reason was because all the precedents are so, and therefore the judgment was reversed; but they said, that the finding him to be a common oppressor of his neighbours, had been good evidence to find him guilty of barretrey; and therefore they bound H. to his good behaviour, and willed that the country indict him again with the word (barretator). Sid. 282. pl. 13. Pasch. 18 Car. 2. B. R. The King v. Hardwicke.

The case of barretrey. — Communis barretator is a term which the law takes notice of, and understands; per Twissden J. Mod. 288. pl. 34. Trin. 29 Car. 2. B. R. — Hawk. Pl. C. 244. cap. 81. f. 9. says it seems clear that no general indictment of this kind, charging the defendant with being a common oppressor and disturber of the peace, stirrer up of strife among neighbours, is good, without adding the words communis barretator, which is a term of art appropriated by the law to this purpose.

No general charge is allowable in any case but barretrey, which in its nature must consist of an heap and multitude of particulars; per Holt Ch. J. and 6 other judges. 2 Salk. 681. pl. 2. Pasch. 5 Ann. B. R. — Dalt. Just. 72. [published in 1742] says it was ruled, that where the defendant was indicted, that he was quotidianus perturbator pacis, the indictment was held good. Hill. 8 W. 3. The King v. Gregory. — A common deceiver is too general, and so is communis oppressor, perturbator, &c. and so of all others (except barretor and scold) without adding of particular instances; per cur. 6 Mod. 311. Mich. 3 Ann. B. R. in case of the Queen v. Hannon.

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2 Keb. 292. pl. 75 S. C. Lays the judgment was reversed.

10. N. was indicted of barretrey, and found guilty, and had his judgment. Afterwards he brought writ of error, and assigned, among other things, that it was tried by the justices of oyer and terminer at the next assises, which could not be, but it ought to be before justices of gaol-delivery. The court were of opinion, that judgment should be reversed for those errors; but the parties agreed to try it again at the bar the next term. Sid. 348, 349. pl. 15. Mich. 19 Car. 2. B. R. The King v. Nurse.

* 2 Hawk. Pl. C. 227. cap. 25 f. 61. S. P. & cites

11. Exception to indictment of barretrey was, because it is only said, ad sessionem pacis tent' coram justiciariis pro le West-riding in Yorksbire, tent' per adjournamentum, and does not say it was actually adjourned,

adjourned, nor before what justice; sed non allocatur; for the first justices goes to all, and it was said *ad commune nocumentum diversorum*, and does not say * *omnium*, as in case of a highway. Sed non allocatur; for it is sufficient, as in case of indictment for a common scold; and judgment pro rege. 2 Keb. 409, 410. pl. 33. Mich. 20 Car. 2. B. R. The King v. Clayton.

S C. because it appears, from the nature of the thing, that it could not but be a common nuisance.

12. In an information for barrettry, it was said that the defendant stood upon his *protection*; but per cur. there is no protection in case of breach of the peace, nor against a rule of B. R. Freem. Rep. 359. pl. 458. Mich. 1673. Anon.

13. One convicted of barrettry produced a pardon of all treasons, &c. and all penalties, forfeitures, and offences. The court said, that the words (all offences) will pardon all that is not capital. Mod. 102. pl. 7. Mich. 25 Car. 2. B. R. Angel's case.

14. On indictment for barrettry the evidence was, that one G. was arrested at the suit of C. for 4000l. and brought before a judge to give bail, and that the defendant, a barrister at law, then present, did solicit this suit, when, in truth, at the same time C. was indebted to G. in 200l. and that he did not owe the said C. one farthing. The Ch. J. was first of opinion that this might be maintenance, but that it was not barrettry, unless it appeared that the defendant did know that C. had no cause of action after it was brought. If a man should be arrested for a trifling, or for no cause, this is no barrettry, though it is a sign of a very ill christian, it being against the express word of God; but a man may arrest another, thinking he hath a just cause so to do, when as in truth he hath none; for he may be mistaken, especially where there hath been great dealings between the parties. But if the design was not to recover his own right, but only to ruin and oppress his neighbour, that is barrettry. Now it appearing upon the evidence, that the defendant entertained C. in his house, and brought several actions in his name where nothing was due, that he was therefore guilty of that crime. 3 Mod. 97, 98. Hill. 1 Jac. 2. B. R. The King v.

15. Judgment on indictment of barrettry was reversed on error, and held per cur. on motion, that no writ of restitution lies to a stranger to the record; and by Ch. J. Holt, if it did, it must be by *scire facias*. Show. 261. Trin. 3 W. & M. The King v. Lever.

2 Salk. 287. pl. 1. S. C. the party was fined 1000l. and levied by the sheriff,

and by him paid into the hands of the collectors. Holt Ch. J. held, that a writ of restitution lay not to the collectors, because not parties to the record; and he also doubted whether a special *sci. fa.* and so make them parties, would be sufficient.

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16. In an indictment of barrettry the defendant must have a note of the particulars, that he may know how they intend to charge him; otherwise the court will not proceed to trial. 5 Mod. 18. Hill. 6 W. & M. in B. R. The King v. Grove.

In indictments of barrettry, the indictment is general, because

it consists of multiplicity of facts; but the court in justice will compel the prosecutor to assign some particular instances, and if he proves them, he shall be admitted to prove as many more of them as he pleases to aggravate the fine; per Gould J. Ld. Raym. Rep. 430. Trin. 11 W. 3. obiter.

† H. was indicted for barrettry, in which case the defendant ought to have a copy of the articles to be insisted on against him at the trial, before hand, that he may have an opportunity of preparing a defence; and here a note left with the defendant's servant was adjudged ill, and a trial, without due notice, ought not to stand, and when there is a rule to give a copy of articles, and that is not done, the

the prosecutor ought not to be admitted at the trial to give any evidence, and then the defendant is of course acquitted. 12 Mod. 516, 517. Pasch. 13 W. 3. *The King v. Ward*.—2 Hawk. Pl. C. 227. cap. 25. f. 61. S. P. — And 1 Hawk. Pl. C. 244. cap. 81. f. 13. says, it seems to be settled practice, not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove against him, for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances.

17. In indictments of barrettry the *names* are never inserted; per Holt Ch. J. and Rookeby. Carth. 453. Trin. 10 W. 3. B. R. in case of *Iveson v. Moor*.

18. In case of barrettry the defendant, upon motion, may have a rule to have articles delivered him of the instances, and the prosecutor shall not give evidence of any particular besides; and if he gives no articles, he shall give no evidence; per Harcourt, master of the office. 6 Mod. 262. Mich. 3 Ann. B. R. in case of *Godard v. Smith*.
 1 Salk. 21. pl. 11. S. C. but S. P. does not appear.—
 3 Salk. 245. pl. 7. S. C. but S. P. does not appear.—
 11 Mod. 56. pl. 32. Pasch. 4 Ann. B. R. the S. C. but S. P. does not appear.

For more of Barretors in general, see other proper titles.

Bastard.

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(A) Bastard. [*Who, in respect of the Time of his Birth.*]

* Cro. J. 541. pl. 1. *Alfop v. Bowtrell*, S. C. and the court delivered their opinion to the jury, that the child born 40 weeks and more after the death of the husband might well be his child. — Palm. 9. *Alfop v. Stacy*, S. C. and says

[1.] If a man dies, and his wife hath issue born 40 weeks and 8 days after his death, as if he dies the 23d of March, and the issue is born the 9th of January following, this issue shall be legitimate, for by nature it may be legitimate, and the law has not appointed any certain time for the birth of legitimate infants. * Mich. 17 Jac. B. R. between upon evidence at the bar, which concerned the heir of one Andrews, resolved per curiam; in which case Dr. Paddy and Dr. Momford, two physicians, being sworn, informed the court, that by nature such issue may be legitimate; for they said that the exact time of the birth of an infant is 280 days from the conception, scilicet, 9 months and 10 days after the conception, accounting it per menses solares, scilicet, 30 days to each month; but it is natural also, if the birth be at any time within 10 months, scilicet, within 40 weeks; for by such account, 10 months and 40 weeks are all one. But by accident an infant may be born after the 40 weeks or

or before; and in the case at the bar it was proved that the wife longed for things in the life of her husband, and the husband died of the plague; so that he was sick but one day before his death; and that the father-in-law of the woman persecuted her, and used her with great inhumanity, and caused her to lie in the streets for several nights; and that the woman was in travail 6 weeks before she was delivered, but that it was interrupted by the said usage of her father-in-law, and that she was delivered within 24 hours after she was received into a house and well used, which was good proof of the legitimation; though it was proved of the other part, that the woman was a lewd woman of her body; and upon evidence the jury found him legitimate. Nota, At the trial one Chamberlain, a man-midwife, informed the court upon his oath, that he had known a woman delivered of one child, and within a fortnight after of another; and the doctors said, the birth is sooner or later, according to the nutriment that the mother hath for it.

that a record of 18 R. 2. was vouched, where the baron died, and the feme took another baron, and 40 weeks and 11 days passed after the death of the first baron, and then the feme had issue, and it was adjudged the issue of the 2d baron, and not of the first; but Dode-

1 H. 6. 3. Rolf said a woman might be enseint for seven years.]

Justice said, there is a difference between the principal case, and the case of 18 R. 2. for in this case, if the child is not the child of the first baron, it will be a bastard, whereas in that other case it is legitimate either way; and adjudged in the principal case, that the child is legitimate. — Godb. 281. pl. 400. Anon. S. C. — S. C. cited Arg. Litt. Rep. 178. and cites several other cases to the like purposes of earlier and later births. — Sty. 277. it was said by the court to have been adjudged in case of *THESSER v. DUNCOMB*, that a woman may have a child in 38 weeks, and that by cold and hard usage she may go with child above 40 weeks.

[2. Bracton, lib. 5. fol. 417. b. *Si partus nascatur post mortem patris* (qui dicitur posthumus) *per tantum tempus quod non sit verisimile quod possit esse defuncti filius*, & hoc probato, talis dici poterit bastardus.]

[3. 18 E. 1. Rot. 13. in B. R. with Mr. Bradshaw, JOHANNES DE RADEWELL brought an assise versus RADULPHUM & HENRICUM, coram Johanne de Vallibus, Willielmo de Malam, & sociis suis itinerantibus apud Bedfordiam. This assise was brought there the 15 E. 1. and after in 18 E. 1. the parties and recognitors of the assise came coram rege, and the assise found inter alia, that after the death of Robert, the husband of Beatrice, the mother of the said Henry, the said Beatrice came into the court of the said Radulph, (of whom the land is held by the service of chivalry,) & prædicta Beatrix præsens in curia quesita an esset pregnant necne, juramento asserbat se non esse pregnantem, & ut hoc omnibus liqueret, vestes suas usque ad tunicam exuebat, & in plena curia sic se videri permisit, & dicunt quod per aspectum corporis non apparebat esse tunc pregnant; upon which evidence the said *Radulph, the lord, took the said John for his heir, &c. Et quia invenitur per veredictum juratorum assise captæ coram præfatis justiciariis itinerantibus quod præd' Henricus natus fuit per undecim dies † post ultimum tempus legitimum mulieribus pariendi constitutum, ita quod præd' Henricus dici non debet filius præd' Roberti secundum legem & consuetudinem Angliæ usitata, imo dici debet secundi viri præd' Beatricis si forte se nupserit alicui infra undecim dies post mortem primi mariti sui, ut si extra matrimonium bastardus; & quia per veredictum

S. C. cited Cro. J. 541. pl. 1. in the case of *Alfop v. Bowtrell*. * But says, note it is not there shewn what was ultimum tempus mulieribus pariendi constitutum. — Co. Litt. 123. cites S. C. and says that legitimum

† Fol. 357.

tempus in that case appointed by law is at the farthest 9 months, or forty

weeks; but she may be delivered before that time.

veredictum juratorum invenitur quod præd' Robertus non habuit accessum ad prædictam Beatricem per unum mensem ante mortem suam, per quod magis præsumitur contra prædictum Henricum, & plane invenitur in recorde, quod prædictus Johannes stetit in seifina ut frater & hæres præd' Roberti per unum annum & amplius, & per voluntatem, & assensum præd' Radulphi capitalis domini, &c. consideratum est quod præd' Johannes recuperet seifinam suam de præd' tenementis per visum juratorum, & præd' Radulphus & Henricus in misericordia. Vide 8 Ed. 2. quod vide Rotulo Parliamenti 6 Ed. 3. Membrana 4. Nota, *The jury found the husband languished of a fever long before his death.*]

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As to this matter, see tit. Ventre inspiciendo.

[4. Britton, fol. 166. the manner is shewn how a jury of women shall be impanelled by the sheriff, after the death of the husband, upon the complaint of the next heir, and the feme shall be viewed by them, and after shall be put in one of the king's castles to be kept from company; and if she hath not a child within 40 weeks after the death of her husband, or if she be not found enseint, let her be punished by fine and imprisonment; and the lords of the fee, as soon as may be without delay, may take the homage of the heirs; and if she hath a child within the 40 weeks, then let this infant be received to the inheritance, if another heir cannot aver this child to be another's than her husband's, or, &c. Vide this.]

Where a man dies, his feme prisoner in seint with a son, and another man

marries her, and after the son is born, he shall be adjudged son of the first baron, and not of the second baron; per Thorp, quod Wilby conceffit; but said, that he heard Bere. J. say, that the infant may chuse which of them he would take for his father; which is not law as it seems. Br. Bastardy, pl. 18. cites 21 E. 3. 39.—The reason is, that in hoc casu filio non potest probari, and says, that so the book [21 E. 3. 39.] is to be intended; and says, that for avoiding such question, and other inconveniencies, the law before the conquest was, sit omnis vidua sine marito duodecim mensibus, & si maritaverit, perdat dotem.

See tit. Baron and Feme (A)

(A. 2) *Who shall be said to be a Bastard, [though born in Marriage, and in respect thereof.]*

* Fitzh. Replication, pl. 8. cites S. C.

† Br. Bastardy, pl. 43. cites 18 E. 4. 28. S. C. & S. P. accordingly by Littleton. pl. 24. there being another pl. 24. which is not S. P.—See tit. Baron and Feme (A) pl. 2. S. P. and the notes there.

[1.] If a man *having one wife, takes another wife* and hath issue by her, living the first wife, this issue is a bastard. * 18 H. 6. 31. † 18 Ed. 4. 30. b. Co. 7. Kenn. 44. for the second marriage is void. 38 Aff. † 24. adjudged.]

Br Bastardy, pl. 9. cites 11 H. 4. 78. S. P.—See (H) infra, S. P.

[2. If a man *marries his cousin within the degrees*, the issue between them is no bastard, till a divorce comes; for the marriage is not void. 18 H. 6. 34. b.]

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[3. So it is if the brother marries *his sister*. 18 H. 6. 32. * 39 * Br. Bastardy, pl. 23. cites S. C.]
Ed. 3. 31. b.]

[4. So if a man marries *his cousin within the degrees of spiritual affinity*, the issue is no bastard till a divorce. 39 Ed. 3. 31.] Br Bastardy, pl. 23. cites S. C. —

See Baron and Feme (A) pl. 3. S. C. — After the stat. 32 H. 8. cap. 38. the husband cannot be afraid to lose his wife, or the wife her husband, nor the heir of them to be bastarded, by reason that the husband before marriage had been godfather, either at baptism or confirmation, to the cousin of his wife; or that she had been godmother before the marriage to the cousin of her husband; for the divorces causa compaternitatis & commaternitatis (which in the act of 1 & 2 P. & M. is called cognatio spiritualis) are by this act taken away. 2 Inst. 684.

[5. If a man hath issue by A. and after intermarries with her, yet this issue is a bastard by our law. † 47 Ed. 3. 14. b. † 11 H. 4. 84. 18 Ed. 4. 30. 39 E. 3. 31. b. 38 Aff. 24.]

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† Br. Bastardy, pl. 6. cites 47 E. 3. 14.
† Br. Bastardy, pl. 12. cites S. C. — Fitzh. Bastardy, pl. 6. cites S. C.

[6. And so he is a bastard by the common law of Scotland. Skene Regiam Majestatem, lib. 2. cap. 5. vers. 2, 3.]

[7. An idiot a nativitate may consent to a marriage, and his issue shall be legitimate. Trin. 3 Jac. B. R. between STILE AND WEST adjudged, upon a special verdict, per un petit question.]

[8. If the husband be gelt, so that it is apparent that he cannot by any possibility beget a child, if his wife hath issue several years after, this will be a bastard, though it was begot within marriage, because it is apparent that it cannot be legitimate. Hill. 14 Jac. in camera stellata, between DONE AND EDGERTON plaintiffs, and two HINTONS AND STARKY defendants, so held by the chancellor and Mountacute, but Hobart e contra.]

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9. A male of 7 years old is married to a female of 14; she before the male is 13 has issue, this issue is a bastard. Jenk. 95. pl. 84. cites 1 H. 6. 3.

Because no law will intend that an infant under that age can

beget a child. 1 H. 6. 3. b. pl. 8. — Br. Bastardy, pl. 26. cites S. C. — Noy 147. cites S. C. — So if the male is 13, and the female 12. Jenk. 289. in pl. 26.

(B) Who shall be said a Bastard, and who a Mulier.

[1. BY the law of the land, a man can not be a bastard who is born after espousals, unless it be by special matter. * 40 Ed. 3. 16. b. † 21 Ed. 3. 39. † 39 E. 3. 31. † 31 Aff. pl. 10. 2 E. 3. 29. b. per Herle and Tond.]

* Fitzh. Bastardy, pl. 9. cites S. C. —
† Ascensage by W. R. against J. P.

and demand of the seign of Walter, who died without issue, by which the land reverted to Ralph as uncle and heir of the part of his father, and from Ralph descended to Lawrence as to son and heir, and from Lawrence to the demandant as son and heir; per Mombray, this Ralph took to some Margery, and had issue Roger eigne, and Lawrence, father of the demandant, puisne, and Roger had issue the tenant, and so is the tenant issue of the elder brother, and the demandant issue of the younger; judgment si actio; the demandant said, that Roger, father of the tenant, was not son of Ralph, but son of one J. D. and because he did not deny the espousals, and that Roger was within the espousals by Margery, therefore such general averment was refused; but per Wilby, he might have said that Roger was the son of John, and born out of the espousals, &c. by which the demandant was awarded to answer further by whom the issue was; the demandant said, that Ralph the grandfather had issue Lawrence, absque hoc that he had such issue Roger born and begotten by this same Ralph during the espousals between him and Margery;

prift; and the other said, that Ralph the grandfather took to feme Margery, and during these espousals Roger was born and begotten of the same Margery, and so was this same Roger the son of Ralph; prift; and the other e contra, and so see that special bastardy shall be tried per pais, and not by certificate of the ordinary. Br. Bastardy, pl. 18. cites 21 E. 3. 39. ¶ Br. Bastardy, pl. 17. cites S. C. but not exactly S. P. ¶ Br. Bastardy, pl. 37. cites 39 Aff. 10. S. P. and Roll here seems to be misprinted. — Fitzh. Bastardy, pl. 18. cites S. C.

* Br. Bastardy, pl. 5. cites S. C. — Fitzh. Bastardy, pl. 10. cites S. C. [2. If a woman be grossly enseint by A. and after A. marries her, and the issue is born during the marriage, this is a mulier, and not a bastard. * 44 Ed. 3. 12. b. 45 Ed. 3. 28.]

† Br. Bastardy, pl. 26. cites S. C. Fitzh. Bastardy, pl. 1. cites S. C. ¶ Br. Bastardy, pl. 5. cites S. C. — Fitzh. Bastardy, pl. 12. cites S. C. — [3. So if a woman be grossly enseint by one man, and after another marries her, and after the issue is born, this is a mulier, because it * is born during the marriage, and no issue can be taken by whom she was enseint, because that cannot be known. † 1 H. 6. 3. contra † 44 Ed. 3. 12. b. 45 Ed. 3. 28. contra 18 H. 6. 31. b. so although the issue be born within three days after the marriage. 18 Ed. 4. 3.] In such case by the common law such issue is a mulier, and by the spiritual law a bastard. Br. Bastardy, pl. 43. cites 18 E. 4. 28.

* [217] § Br. Bastardy, pl. 21. cites S. C. In assise the tenant said, that J. was seized in fee, and took to feme K. of whom he begot the tenant, a son, and the plaintiff, a female, and died, and the plaintiff claiming as heir entered, and the defendant oulited her. The plaintiff replied, that the tenant was bastard. The defendant rejoined that he was mulier. Whereupon the bishop was wrote to, who certified bastard, and the manner how, viz. that J. took to feme K. who eloped, and lived in adultery with F. S. who begot of her the tenant, and so bastard. Thereupon the tenant complained to the parliament, because the certificate was contra legem terræ, and so it seems, for that it is not certified whether the baron was infra quatuor maria or not. But afterwards judgment was given for the plaintiff according to the certificate; and so see that the justices have no regard to the manner or cause of the certificate, but only to the effect thereof, which was, that the tenant was a bastard; quod nota. — Fitzh. Bastardy, pl. 8. S. C. says, that by his being adjudged a bastard by the law of holy church, the justices took the assise in right of damages, and awarded that the plaintiff recover seisin and damages; quod nota. — By the common law, if the husband be within the four seas, viz. within the jurisdiction of the king of England, and the wife has issue, no proof is to be admitted to prove the child a bastard; for in that case filiation non potest probari unless the husband had an apparent impossibility of procreation. Co. Litt. 244. a.

* Br. Bastardy, pl. 26. cites S. C. — Fitzh. Bastardy, pl. 1. cites S. C. — ¶ Br. Bastardy, pl. 4. cites 43 E. 3. 29. [and it should be 19. b. 20.] [5. If a wife elopes, and lives in adultery with another, and during this, issue is born in adultery, yet this is a mulier by our law. * 1 H. 6. 3. † 43 E. 3. 18. b. 20. 18 E. 4. 30. Hill. 14 Jac. in camera stellata, agreed per curiam, in the case of EDGERTON before cited. † 39 E. 3. 14. ¶ 38 Aff. 14. contra 40 E. 3. 16. b. ¶ 33 Aff. 8. but the baron ought to be within the four seas, so that by indentment he may come to his wife, otherwise the issue is a bastard. 40 [43] E. 3. 20. 33 Aff. 8.] S. P. by Kirton contra, but by Belk. according to Roll, if the husband be within the 4 seas, and can come to her, quod non fuit negatum; ideo quære in case the baron was imprisoned at the time. † See pl. 4. and the notes. ¶ Br. Bastardy, pl. 35. cites S. C. that he was certified a bastard, and therefore the special matter indorsed on the writ, viz. that she lived 7 years from her husband, in which time the child was begotten and was not regarded. ¶ Fitzh. Bastardy, pl. 16. cites S. C.

[6. So if a feme covert goes into another county, and takes husband, and hath issue by him, the first husband being within the seas, the issue is a mulier. 7 H. 4. 9. b.]

Br. Bastardy, pl. 8. cites S. C. —Fitzh. Bastardy, pl.

4. cites S. C. —One that is born of a man's wife while the husband at and from the time of the begetting to the birth is *extra quatuor maria*, is a bastard within 18 El. 3. which is a remedial law; per Holt. 2 Salk. 484. pl. 38. Mich. 10 W. 3. B. R. The King v. Albertson. —S. P. but if he were here at all during the time of the wife's going with child, it is legitimate, and no bastard. 1 Salk. 122. pl. 5. Múch. 3 Ann. B. R. The Queen v. Murrey.

[7. But otherwise it is if the baron be over the seas. 7 H. 4. 9. b.]

Br. Bastardy, pl. 8. cites S. C. —Fitzh. Bastardy, pl. 4. cites S. C.

[8. If the feme hath issue, the baron being over the seas for 7 years before the birth, the issue is a bastard by our law. 19 H. 6. 17. b.]

Br. Bastardy, pl. 20. cites S. C. & S. P. admitted.

[9. [So] if a feme covert hath issue, the baron being over the seas 6 years before the birth, this is a bastard by our law. 18 H. 6. 34.]

[10. So if the feme hath issue, the baron being over the seas 3 years before the birth, and three years after the birth, the issue is a bastard. 18 H. 6. 32. b.]

[11. If a man hath been so long over the sea, before the birth of the issue which his wife hath in his absence, that the issue cannot be his issue, this is a bastard. Hill. 14 Jac. camera stellata, between DONE AND EDGERTON plaintiffs, and two HINTONS AND STARKY defendants, resolved by the judges and chancellor.]

[12. Contra 13 Ed. 2. Bastardy 25. where it was found the father was in Ireland when the son was begotten, yet the plaintiff was nonsuit, which is, that he is no bastard.]

If baron be in Ireland for a year, and feme in England

during this time has issue, it is a bastard; but it seems otherwise now for Scotland, both being under one king, and make but one continent of land; absence beyond sea takes away all intendment, that baron privately and secretly may be with his wife as he may if he be in England, though his wife had eloped and lived with the adulterer. Jenk. 10. pl. 18.

[13. If a woman hath issue, her husband being within the age of 14, the issue is a bastard. 1 H. 6. 3. b.]

Fol. 359.

For an infant at such age cannot have issue. Br. Bastardy, pl. 26. cites S. C.

[14. If a woman hath issue, her husband being but of the age of 3 years, the issue is a bastard. 18 H. 6. 31. because it appears he cannot have issue at this age. So if she hath issue, the husband being but 6 years of age at the birth. 18 H. 6. 34.]

[15. So if she hath issue, the husband being but 7 years of age at the birth, this issue is a bastard. 38 Aff. 24. per Tanke.]

Br. Bastardy, pl. 36. cites S. C.

[16. So if she hath issue, the baron being only of the age of eight years at the birth; for it cannot be intended by law that it was begot by the baron. 38 Aff. 24. per Tanke. * 29 Aff. 54. adjudged.]

Br. Bastardy, pl. 36. cites S. C. — * Br. Bastardy, pl. 32.

cites S. C. —S. P. accordingly, and so if he be under the age of procreation. Co. Litt. 244. a.

[17. So

Br. Bastardy, pl. 32. cites S. C. but S. P. exactly does not appear. — But Br. *ibid.* pl. 36. cites 28 Aff. 24. that if infant at 7 or 8 years be married, and has a child within one or two years, this issue is a bastard. *Quod non negatur.*

Scire facias upon a fine; the tenant said that he held for life, the reversion regardant to A. and prayed aid of him, and the other said that the mother of A. was grossly enseint of A. by H. and so enseint H. father of A. in his malady espoused her, and died the 15th day after, and so A. a bastard, and the other said, that she was enseint by W. and not by H. and so at issue; quod mirum! that this issue was suffered. Br. Bastardy, pl. 5. cites 44 E. 3. 10.

Br. Verdict, pl. 21. cites S. C. [219] 19. In assise at Warwick, 19 H. 7. it was found by verdict, that the father of the tenant had taken the order of *deacon*, and after married a feme and had issue; the tenant who entered, and another collateral heir entered upon him, and they were adjourned for difficulty; and it was debated in the exchequer chamber, whether the tenant should be a bastard; and it was adjudged by advice that *he should not be a bastard*. Quod nota. And Frowyke Ch. J. said, that he was a counsel in this matter, and that it was adjudged ut supra, quod Vavisor concessit. Br. Bastardy, pl. 25. cites 21 H. 7. 39.

20. And Frowyke said, that if a priest takes feme and has issue, and dies, his issue shall inherit; for the espousals are not void, but voidable. *Ibid.*

21. If a man takes a nun to wife, these espousals are void; per Vavisor. Quod nota bene, for none denied it. *Ibid.*

(C) *Who shall be said a Bastard, who not. What.*
[How considered in Law.]

Br. Bastardy, pl. 26. cites 1 H. 6. 3. [1. A Bastard is nullius filius, neither of father nor mother. 41 Ed. 3. 19.] S. P. by Straunge; for a bastard is filius populi, and has no father certain. — S. P. for qui ex damnato coitu nascuntur inter liberos non computantur. Co. Litt. 3. b. & 78. a.

(D) Bastard by our Law, and Mulier by the Civil Law.

* Br. Bastardy, pl. 6. cites S. C. [1.] If A. hath issue by B. and after they intermarry, yet the issue is a bastard by our law. * 47 E. 3. 14. b. † 11 H. 4. 84. but

but a mulier by the civil law. 11 H. 4. 84. Bracton, lib. 5. fol. 416, 417.] but S. P. does not clearly appear.

† Br. Bastardy, pl. 12. cites S. C. and S. P. admitted.

[2. If the *parents are divorced, causa consanguinitatis*, they not having notice thereof at the marriage, the children, had before, are bastards by our law, and muliers by the civil law. 18 E. 4. 24. b.] Br. Bastardy, pl. 43. cites 18 E. 4. 28. [but it should be 18 E. 4. 29.

a. b. pl. 30. a. pl. 28.] S. P. and seems to intend S. C. of Roll here, which seems misprinted. S. C. cited Roll. Rep. 212. Trin. 13 Jac. B. R.

[3. If a man *hath issue by a woman*, and *after marries the same woman*, the issue by our law is a bastard, and by the spiritual law a mulier. 18 E. 4. 30.] By the statute of Merton, 20 H. 3. cap. 9. it is enacted,

that a child born before marriage is a bastard, albeit the common order of the church be otherwise.

[4. *Such issue is a bastard* by our law, yet he shall be called the son of them in our law; for a remainder limited to him by such name is good. 41 E. 3. 19. Co. 6. 65.] See tit. Grants (D) pl. 10. S. C. and the notes there,

and *ibid.* pl. 8, 9, 11, 12, 13.

(E) Bastard by the *Spiritual Law*, and Mulier by our Law. [220]

[1. If a man *marries a woman grossly big by another*, and *within three days after she is delivered*, in our law the issue is a mulier, and by the spiritual law a bastard. * 18 E. 4. 30. † 1 H. 6. 3.] * Br. Bastardy, pl. 43. S. P. cites 18 E. 4. 28. but is misprinted.

ed, and should be 29. b. 30. pl. 28. † Br. Bastardy, pl. 26. cites S. C. but S. P. as to the three days does not appear there; but by Strange, if an infant be born within 5 or 6 months, or less, after the espousals, it is a bastard.—Fitzh. Bastardy, pl. 1. cites S. C. says, it cannot be a bastard, if it be born within the espousals.

[2. So § 43 E. 3. 20. gives a limitation, scilicet, that it shall be a mulier, if the baron be within the 4 seas, so that he may come to his wife. § Contra 11 H. 4. 14. b.] § Br. Bastardy, pl. 4. cites S. C. & S. P. by Belk. Quod

non suit negatum; but Brooke says, ideo quere if the baron was imprisoned at the time. § Fitzh. Bastardy, pl. 5. cites S. C. & S. P. by Huls. that it is a bastard if born and begotten in adultery, though the husband is within the 4 seas.

[3. If a woman *elope, and hath issue in adultery*, the issue is a mulier in our law, and by the spiritual law a bastard. 18 E. 4. 30. ¶ 43 E. 3. 19. b. 20.] ¶ See (B) supra, pl. 5. S. C. and the notes there. —

7 Rep. (44) 43. a. Mich. 5 Jac. S. P. obiter.

[4. But 40 E. 3. 16. is, that if a feme continues in adultery, and hath issue, this is a bastard in our law.] { Fol. 360.

[5. But

Firsh. Bastardy, pl. 9. cites S. C.

[5. But by the law of the land a man cannot be a bastard that is born after marriage, unless by special matter. 40 E. 3. 16. b.]

(F) Bastard by both [Laws.]

* Br. Bastardy, pl. 43. S. P. per Littleton, cites 18 E. 4. 28. but it should be here as in Roll, viz. 18 E. 4. 30. but in the Year-book it is pl. 28. which may be the occasion of the misprinting.

[1. A Man who hath a wife takes another wife, and hath issue by her, this issue is a bastard by both laws; for the second marriage is void. * 18 E. 4. 30. b. Co. 7. Kenn. 44. ‡ 18 H. 6. 31.]

‡ Fitzh. Replication, pl. 8. cites S. C.

[221] (G) What Divorce bastardizes the Issue.

Resolved by the two Ch. Justices, the [1. A Divorce *causa præcontractus* bastardizes the issue. 47 E. 3. pl. 78. 18 H. 6. 34.]

Ch. Baron, Williams, and Altham, on a reference out of the court of wards, that a divorce being by sentence in the spiritual court between Kenne and his wife, *causa præcontractus*, or other cause, the parties being dead between whom it was, the court of wards cannot now examine it to prove another heir against that sentence. Cro. J. 186. pl. 6. Mich. 5 Jac. B. R. Robinson v. Stallage. 7 Rep. (42) 41. b. Kenne's case, S. C. — Jenk. 289. pl. 26. S. C.

Such divorce bastardizes the issue, because it dissolves the marriage a vinculo matrimonii, and so it is of all other such divorces, as divorce *causa metus*, *causa impotentiae*, seu *frigiditatis*, *causa affinitatis*, *causa consanguinitatis*, &c. because they were not justæ nuptiæ; but divorces a mensa et thoro, as *causa adulterii*, dissolves not the marriage a vinculo matrimonii; because it is subsequent to the marriage. Co. Litt. 235. a. — Cro. C. 462. Arg. cites 47 E. 3. fol. ultimo, where the 5 causes above are mentioned; and ibid. 463. cites Co. Litt. 235. mentioning the same divorces to be a vinculo matrimonii, and which are all preceding the marriage; but that where the dissolution is only a mensa et thoro, as *causa adulterii*, the coverture continues between them. — A child begotten after divorce a mensa et thoro, shall be taken to be a bastard; otherwise after *voluntary separation*, unless found that the husband had no access. 1 Salk. 123. St. George's v. S. Margaret's Parish, Wettminder. — And ibid. says, that so was the opinion of Hale Ch. J. in the case of Dickens v. Collins.

S. P. Br. Deraignment, pl. 10. [2. So *causa consanguinitatis*. 47 E. 3. pl. 78. contra 29 E. 1. Bastardy 21. curia.]

cites 8 E. 4. 28. — See pl. 1. and the notes there. — Where a marriage has been had, and the parties are afterwards divorced for consanguinity, or affinity, such sentence of divorce will be *conclusive evidence* to bastardize the children born in wedlock before the divorce; per Ld. Chan. 8 Mod. 182. Trin. 9 Geo. in case of Hiliard v. Phaley.

See pl. 1. and the notes there. [3. So *causa affinitatis*. 47 E. 3. pl. 78.]

A divorce *causa frigiditatis*, where the party has perpetuam impotentiam generationis, declares the marriage to be void. 2 Inst. 687.

Husband and wife are divorced *causa frigiditatis* in the husband; the husband marries another wife, and has issue by her; the husband dies; this issue is legitimate. The said divorce dissolves vinculum matrimonii. The second marriage might be dissolved in the life of the parties, but not after the death of any of them; and if it had been so dissolved in the life of the parties, the said issue of the second marriage had been a bastard; so adjudged and affirmed in error. Jenk. 268. 269. pl. 24. 40 Eliz. Bury's case. — 5 Rep. 98. b. S. C. adjudged and affirmed accordingly, and a man may be habilis et inhabilis diversis temporibus, and therefore, notwithstanding the depositions whereupon sentence was given in the spiritual court, by which a natural and perpetual imbecility ad generandum were depose,

the

the issue was adjudged lawful.——And. 185. pl. 221. 28 & 29 Eliz. *Morris v. Webber*, S. C. says, the case was argued by the serjeants, but little to the purpose; for the point depended on the canon law, and therefore after divers arguments the court thought it convenient to be argued by doctors of the civil law, to be chosen by each party, and after it was argued by them, gave judgment according to the sentence in the spiritual court.——Mo. 225. pl. 366. S. C. adjudged for the plaintiff, that the issues were not bastards, because the divorce was not annulled by sentence declaratory of the church in the lives of the parties; and our law is not to enquire the cause of the divorce, but to take the sentence for good till repealed; and says the same case came in question again in ejectment, *Hill*. 40 Eliz. between *Webber* and *Bury*, where the special matter was found, and upon several arguments adjudged again as before.——2 Lc. 169. pl. 207. S. C. *Trin*. 29 Eliz. C. B. adjudged for the plaintiff accordingly; for though in the examinations and depositions taken in the ecclesiastical court no matter appears upon which such peremptory divorce might be granted, yet it might be, as the court said they were informed by the said doctors, that upon the examination of physicians and matrons, sufficient matter did appear to the said ecclesiastical judges, (which for modesty sake ought not to be entered of record) and that appears within the sentence, viz. *habito sermone cum matronis et medicis*, which speech not entered of record, (*causa qua supra*) might be the cause that induced the ecclesiastical judges to give sentence for the divorce, though the matter within the record be too general to prove, *naturalem frigiditatem generandi*, but rather *maleficium*; and says, that upon error brought 41 Eliz. judgment was affirmed.——But see *D*. 178. pl. 140. *Hill*. 2 Eliz. *SABELL'S CASE*, and *BURY'S CASE*, cited there as about a year after, where the opinion of the doctors was, that they should be compelled to cohabit as man and wife, because *sancta ecclesia decepta fuit in priori iudicio*, and therefore * great suit was made to stay a fine, whereby the feme gave all her inheritance to her second husband; but after staying it one term, it was ingrossed by command of the justices, *contra mandatum custodis magni sigilli*.——And *ibid*. *Marg*. cites *Hill*. 37 Eliz. *STAFFORD v. MANGY*, in case of bastardy, feme sued divorce for frigidity, and after the baron married another feme, by whom he had issue, and adjudged that the second marriage is void, and there the civilians gave a rule, that *qui aptus est ad unam aptus est ad aliam*, and *quando potentia reducit ad actum, debet redire ad primas nuptias*. Ex libro *Mr. Tho. Tempest*.——But *ibid*. cites *Harrison's reading*, *Lent* 1632. that *impotentia et frigidity quoad hanc* is cause sufficient of divorce after exploration and trial for 3 years, and other ceremonies enjoined by the canons, and that the second marriage of both is good, notwithstanding the party impotent have children.——*Roll. Rep*. 212. *Trin*. 13 Jac. B. R. cites *Berrie's case*.

[5. But a divorce *causa professionis* does not bastardize the issue. 47 E. 3. pl. 78.]

[6. A divorce for cause of *spiritual affinity* bastardizes the issue. 39 E. 3. 31. b. as if the baron hath baptized the cousin of the feme.]

7. Affise by J. and A. his feme against H. M. who said that A. sued divorce in the archbishoprick of York, because she was *within the age of consent at the time of the espousals*, and never assented to them, by which divorce was had between them, and so not his feme; judgment of the writ; and so see that this is a good cause of divorce. *Br. Deraignment*, pl. 6. cites 39 E. 3. 32. these marriages are said to be prohibited by God's law, otherwise the stat. 32 H. 8. would extend to them. 2 Inst. 687.

* [222]
See tit. Baron and Feme (A) pl. 9, 10, 11. and the notes there. 2 Inst. 687. cites S. C. that *causa impubertatis et causa matris sine duritia*, declare the marriage to be void;

(H) At what Time the Divorce being made, it shall bastardize the Issue. [And what the Ecclesiastical Court may inquire after the Death of the Man and Woman, or either of them.]

[1.] F baron and feme continue baron and feme for all their lives, the issue cannot be a bastard by a divorce after their death, for the divorce in the spiritual court is *pro peccatis*, which cannot be after their death, and therefore such divorce there is only to disinherit the issue, which they cannot do. † 39 E. 3. 31. b. 32. for by such means every one might be disinherited. † 31 Aff. pl. 10.]

† *Br. Bastardy*, pl. 23. cites S. C. where in affise the tenant pleaded bastardy in the plain-

[2. As

tiff, and the case was, that the father married a feme, [2. *As the issue cannot be a bastard after the death of the baron and feme, by a divorce for cause of spiritual affinity, for the cause aforesaid.* 39 E. 3. 31. b. 32. 31 Aff. pl. 10.]

where he had before it baptized one A. cousin of his feme, and therefore after the death of the one of them a divorce was sued, and judgment given. And per Thorpe, and the best opinion clearly, *this divorce is only pro peccatis, and shall not bastardize the heir by it*; for such divorce cannot destroy the espousals, because they were determined before. — Br. Deraignment, pl. 5. cites S. C. Brooke makes a quære if it be cause of divorce. — And Brooke says, it seems that if espousals are had, which are *defensible but not void*, they may be avoided by a divorce; and if not, then the heir is inheritable. Br. Bastardy, pl. 23. cites 39 E. 3. 32.

† Br. Bastardy, pl. 37. cites 39 Aff. 10. S. P. by Thorpe. — Fitzh. Bastardy, pl. 18. cites 39 Aff. 10. S. P. and it seems that Roll is misprinted, and that it should be 39 Aff. pl. 10.

* [223]

7 Rep. (44)

43. b. in

Kenn's case,

the reporter

notes a di-

versity be-

tween repeal

of a sentence

given in the

life of the

parties, and

giving sen-

tence of di-

vorce after

the death of

the parties;

for it appears

by 22 E. 4.

in Corbet's

case, (there

before cited)

that a sen-

tence of di-

vorce cannot

be repealed

in the spiritual

court by suit

there after the

death of the

parties; but

if any of the

parties be dead

before any

divorce sen-

tenced in the

ecclesiastical

court, there

they cannot

sue in court

christian to

declare the

marriage void,

and bastardize

the issue, be-

cause the trial

belongs to the

King's court

originally; and

that with this

accords the 39

Aff. 10. 39

E. 3. 31. and

24 H. 8. tit.

Bastardy, 44.

b. that divorce

after the death

of any of the

parties, or sen-

tence declaratory

that the marriage

was avoided after

the death of any

of the parties,

shall not bind;

[3. *If A. takes B. to wife, and hath issue by her, and after they are divorced, because they were within the age of consent at the time of their marriage, and after disagreed, and after A. takes C. to his wife, who dies, and after takes D. to his wife, by whom he hath issue,* and dies, upon the suit of the issue of B. the ecclesiastical commissioners, upon a commission directed to them, cannot examine the marriage between A. and C. because they are dead; for by this examination the inheritance would be drawn in question, which is not lawful after they are dead.* Mich. 8 Jac. B. KENN'S CASE, resolved, and a prohibition granted.]

[4. [So] *If A. takes B. to his wife within the age of consent, and after at the age of consent they disassent, and marry themselves elsewhere, and have issue, and die, it cannot after be examined in the ecclesiastical court whether they did consent at the age of consent, before their disassent, because they cannot bastardize the issue after their death.* ENGLEFIELD'S CASE, by all the justices resolved, and a prohibition granted in chancery thereupon, cited Trin. 11 Jac. B.]

in the spiritual court by suit there after the death of the parties; but if any of the parties be dead before any divorce sentenced in the ecclesiastical court, there they cannot sue in court christian to declare the marriage void, and bastardize the issue, because the trial belongs to the King's court originally; and that with this accords the 39 Aff. 10. 39 E. 3. 31. and 24 H. 8. tit. Bastardy, 44. b. that divorce after the death of any of the parties, or sentence declaratory that the marriage was avoided after the death of any of the parties, shall not bind; for it is only in effect to bastardize the issue, of which they have not consueance originally. — Jenk. 289. pl. 26. S. C. no man can be made a bastard by any sentence after the death of the pretended husband and wife who had the issue; but a sentence given for a marriage may be repealed after the death of the parties, and so ex obliquo bastardize the issue.

[5. *If administration be committed to the use of the wife of the testator, and after a libel is preferred in the ecclesiastical court, surmising that † she was not the wife of the testator, because they were married within the age of consent, and that at the age of consent they did disassent, a prohibition shall be granted, because after their death they shall not bastardize the issue.* Trin. 11 Jac. B. LAN-
NER'S CASE.]

And if the

commissary

in his visita-

tion find such

cause of di-

vorce, and

after a di-

vorce is thereof

made, after the

death of one of

the parties, this

shall never

bastardize the

heir; per Thorpe

strongly; and it

seems to be law,

and so it was

taken in parlia-

ment 24 H. 8.

Br. Bastardy,

pl. 23.

cites 39 E. 3.

6. *If a man espouses his sister, and has issue, and dies, the issue is inheritable, because a divorce was not had in their lives when the espousals continued; for it cannot be after the espousals determined by death, viz. to bastardize the heir.* Br. Bastardy, pl. 23. cites 39 E. 3. 32.

where is thereof made, after the death of one of the parties, this shall never bastardize the heir; per Thorpe strongly; and it seems to be law, and so it was taken in parliament 24 H. 8. Br. Bastardy, pl. 23. cites 39 E. 3. 32. — Br. Deraignment, pl. 5. cites S. C.

7. A divorce has *relation to make void the marriage ab initio*, where it is for a cause arising before the marriage, and to issue born bastards. See Trial (B. a) pl. 5. cites 43 Aff. 43.

8. Where a man *marries his next cousin*, and they *have issue*, and he dies, the issue shall not be a bastard; for the *espousals are not void without divorce*; per Norton. And it seems by him, that when the espousals are *determined by the death of the one of them*, a divorce cannot be sued; for they cannot defeat the espousals which were determined before. Br. Bastard, pl. 9. cites 11 H. 4. 78.

9. Per Coningsby it was adjudged, in the CASE OF CORBET, that if baron and feme *had issue, and after were divorced*, and after the baron *took another feme and had issue*, and the *first issue sued in the spiritual court to reverse the divorce after the death of his father, to bastardize the second issue*, and a prohibition was granted, *quod non negatur*; but it was said that the title and the descent were comprised in the libel, and otherwise he had not had it, as it seems. Br. Deraignment, pl. 14. cites 12 H. 7. 22.

10. In prohibition it was agreed, *arguendo*, that if a man be *divorced, and takes another feme, and dies, having issue by the first feme*, this issue may sue to defeat the divorce, and bastardize the issue of the second feme, though the baron who was divorced is dead. Br. Bastardy, pl. 47. cites 12 H. 7. 42.

11. Note, if a man *marries his cousin within the degrees of marriage*, who have issue, and *are divorced in their lives*, by this the espousals are avoided, and the issue is a bastard; and *contra* if the one *dies before a divorce*, there a divorce had after shall not make the issue a bastard; for the espousals are determined by the death before, and not by the divorce, and a dead person cannot bring in his proofs; and so is the best opinion, Fitzh. Trial, 41. anno 39 E. 3. For a *divorce after the death of the party* is not *but ex officio ad inquirendum de peccatis*; for a dead person cannot be cited nor summoned to it. Br. Bastardy, pl. 44. cites 24 H. 8.

12. In trespass the case was, *B. contracted himself to A. and afterwards A. was married to T. and cohabited with him*. B. sued A. in the court of audience, and proved the contract, and *sentence was pronounced that she should marry the said B. and cohabit with him, which she did, and they had issue C. and then B. the father died*. It was argued by civilians of each side; but it was resolved by the justices, that C. the issue of B. was legitimate. Mo. 169. pl. 303. Pasch. 23 Eliz. B. R. Bunting's case.

contracts with a feme to marry her, and after he marries another, and the first feme sues in the spiritual court, and the first marriage is sentenced void, the man and the first feme are husband and wife; by Windham Serj. and he said, that Noy Att. General, in Mr. Harrison's lecture in Lincoln's-Inn, held that by this sentence they are complete husband and wife, without other solemnity; but this was denied by Twisden J. who said that the marriage ought to be solemnized before they should be baron and feme. Sid. 13. pl. 2. Mich. 12 Car. 2. B. R. Paine's case.—S. P. cited by Noy, D. 105. b. Marg. pl. 17.

By the act of 32 H. 8. cap. 38. the divorce causa præcontractus was taken away, where the marriage was consummated by carnal copulation, &c. but that is repealed, and the divorce allowed by the Stat. of 2 E. 6 cap. 23. and 1 Eliz. cap. 1. 2 Inst. 684.

13. A man *married his father's sister's daughter*. This is no cause of divorce; but it was adjudged, that though that marriage [might

[224]

Br. Deraignment, pl. 11. cites S. C.—Br. Deraignment, pl. 12. cites 5 E. 4. 3. S. P. and 24 H. 8.

4 Rep. 29. Mich. 27 & 28 Eliz. Bunting v. Iepingwell, S. C. resolved, that the plaintiff was legitimate, and no bastard.—If a man

If a marriage de facto be

voidable by divorce, in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have been dissolved, and the parties freed a vinculo matrimonii, yet if the husband die before any divorce, then, for that it cannot be avoided, this wife de facto shall be endowed; for this is legitimus matrimonium quoad dotem. Co. Litt. 33. a. b.

[might be said to] be within the Levitical degrees, yet it is a *marriage de facto*, and only avoidable by divorce, which after the death of the husband cannot be done, because thereby the issue will be bastardized; and if the wife had been inheritrix, &c. the husband should have been tenant by the curtesy; and vouched 7 H. 4. Noy 29. Hill. 15 Jac. C. B. Rennington v. Cole.

A prohibition was granted as to the annulling the marriage; but that they may proceed as to punishing the incest,

14. The court christian having proceeded to annul an *incestuous marriage*, (where the woman died before sentence,) prohibition was granted as to their declaring the marriage to be void; for when the incest is determined by the woman's death, they cannot bastardize the issue, though they may punish the incest. Comb. 200. Pasch. 5 W. & M. in B. R. Hicks v. Harris.

but not to make void the marriage, or bastardize the issue; for that is against law. And the authority in Kenn's case was the rule in this case. Carth. 271. S. C.—4 Mod. 182, Hinks v. Harris, S. C. and cited 7 Rep. 44. b. Kenn's case, and a prohibition was granted, nisi.—12 Mod. 35. S. C. and prohibition granted accordingly.

The rule that it shall not be bastardized *after his death*, holds only in case of bastard eigne & mulier puisne, and the spiritual court cannot give sentence to annul marriage after the parties are dead, because they proceed only *pro salute anime*, and then it is too late. 1 Salk. 120. pl. 1. Hill. 6 W. 3. B. R. Pride v. Earl of Bath.

And the meaning of the saying, that one shall not be bastardized after the death of either of his parents is, that the spiritual court shall *not proceed to dissolve a marriage de facto* after the death of * either parties, as in case of consanguinity, precontract, &c. per Holt Ch. J. 12 Mod. 432. Mich. 12 W. 3. in case of Hemming v. Price.

* [225]

15. Where there was a *sentence in the spiritual court*, that the parties were *not married*, a person claiming under the issue of that marriage, as pretended, shall not be allowed to prove a marriage on a trial at law; for such sentence, while unrepealed, is conclusive against all matters precedent, and the temporal court must give credit to it, it being a matter of mere spiritual consufance, and so the plaintiff was nonsuited. Carth. 225. Pasch. 4 & 5 W. & M. in B. R. Jones v. Bow.

The reporter adds a quære; for in case of Hill v. Underwood, Trin. 1739. Ld. Chancellor seemed not satisfied with

16. A woman was *supposed to marry A. first, and afterwards during his life to marry B.* and in a cause of jactitation of marriage in the spiritual court in Ireland, the first marriage was affirmed; but on an appeal to the delegates in Ireland, the same was disallowed, and the *2d marriage adjudged good*. By the 2d marriage there was issue, but none by the first. 2 Wms.'s Rep. 299. pl. 82. Trin. 1725. Franklin's case.

this resolution. — Select Cases in Chan. in Ld. King's Time, 47. S. C. and the motion was objected to, because though commissions of review had frequently gone, in respect of sentences relating to wills in Ireland, that was because the law here and there, as to them, are both the same; but it is not so in respect of marriage. Per Ld. Chancellor, by the 32 H. 8. cap. 38. *where there is issue, a marriage shall not be set aside for precontract*: that still is the law of Ireland, though altered here by the 2 & 3 E. 6. cap. 23. and though 2 Ed. 6. is repealed by 1 P. & M. yet it is revived by 1 Elis. cap. 1. But though the law be different, if a commission should go, they must judge by the Irish laws. A commission of review is not of right, but gratuitous and discretionary; that it is so, must have been for some reasons, to re-examine where were visible hardships. The only end aimed at here, by granting the commission, is to bastardize the issue, which I shall never advise the king to do. If there had been no issue, it had been very different; let them enjoy the good fortune of their legitimacy.

(H. 2) Pleadings. And in what Actions it shall be a good Plea to say that the Plaintiff is a Bastard. And How.

1. **BASTARDY** is a good plea in an *action possessory*, as in ** Br. Mortdancestor, pl. 13. cites S. C.* writ of *ayel, mortdancestor, &c.* though it be a plea which trenches to the right. *Br. Bastardy, pl. 27. cites * 1 Aff. 13. & H. 10 E. 3. accordingly in writ of ayel.*

2. Where a man *alleges that his ancestor, whose heir he is, was son of R. born and begotten of M. during the espousals between R. and M. the other, in cofinage, shall not say that he was son of J. and not son of R.* *Br. General Issue, pl. 12. cites 21 E. 3. 39.*

3. In assise the tenant said that his father was seised, and died seised, and he entered as heir; and the plaintiff claiming as heir, where he was born out of any espousals, entered, and the tenant ousted him, and held that the defendant shall give a mother to the plaintiff, and so he did; the plaintiff said that he was born within the espousals between A. and B. his feme, his father and mother, and so mulier, prist by assise, and the other e contra, and this was tried by the assise. *Quod nota. Br. Bastardy, pl. 30. cites 25 Aff. 13.*

Scire facias to execute a fine levied to A. in tail, the remainder to the plaintiff, and that A. was dead without issue. The tenant said that A. had issue J. who had issue S. who had issue K. who had issue J. who is alive; judgment. Per Skrene, K. died without issue, absque hoc, that he had ever such a son as J. But per Norton, then you shall give to him another father, and another mother; and he alleged espousals, and that J. was born at N. in the same county; but per cur. Skrene has said enough, and that the allegation of the espousals is to no purpose to make the plaintiff give to J. another father. Quod nota, by which they were at issue as Skrene tendered, &c. Br. Bastardy, pl. 10. cites 11 H. 4. 74.

4. Assise by J. M. son of N. M. against W. M. and K. M. K. [226] pleaded nul tort, and W. said quod assisa non. For he not confessing that J. the plaintiff is son of N. M. but N. M. father of the tenant was seised of the land in fee, and took K. to feme, of whom he begot W. now tenant within the espousals; and after the death of N. his father, we entered as son and heir; and the plaintiff claiming as son and heir of the father, where he was born before the espousals abated, and we ousted him, judgment if assise; and upon long debate the bar was awarded good; and to this the plaintiff said that the father married E. before K. and begot the plaintiff of E. within the espousals, and you have acknowledged us to be elder than you, by which he prayed the assise; to which the tenant said that the father married K. mother of the tenant, between whom the tenant was begotten within the espousals, absque hoc, that E. was ever the feme of N. the father, prist by assise; and because the plaintiff himself had shewn that he had another mother than K. and named E. therefore he has now given advantage to the tenant to traverse it, quod nota, and therefore the plaintiff was compelled by the court to rejoin to this issue. *Quod nota. Br. Bastardy, pl. 31. cites 28 Aff. 46.*

5. In assise it was found that E. was seised, and took a feme at eight years, and that his feme had issue J. the tenant at 8 years by a

chaplain, and after had issue N. and died, and N. entered as heir and enfeofed the plaintiff, who was seised till J. the bastard disseised him, by which the plaintiff recovered; and there it is taken, if the youngest son enters upon the eldest, and enfeofs A. who continues years and days, that the eldest cannot enter, which is not law; therefore, quære the cause of the judgment, whether for this cause, or for the bastardy; and it seems for the bastardy. Br. Bastardy, pl. 32. cites 29 Aff. 54.

6. In detinue of charters by J. son of T. of W. it is no plea that the plaintiff is a bastard; for he demands only chattels of which he was in possession; by which his challenge was entered, and he was compelled to answer. Br. Charters de Terre, pl. 24. cites 38 E. 3. 22.

7. In assise the tenant made himself heir to H. and that the plaintiff is a bastard. The plaintiff replied that H. took to feme A. at D. between whom in the espousals was the plaintiff born and begotten; judgment if he may bastardize him; and it was held a good plea to make the other answer, and so he did, and alledged a divorce; for it shall be intended by the espousals that he is a mulier, without special matter shewn to the contrary. Br. Bastardy, pl. 37. cites 39 Aff. 10.

8. Scire facias upon a fine. The tenant said that he held for life, the reversion regardant to A. and prayed aid of him, and the other said that the mother of A. was grossly enseint of A. by H. and so enseint H. father of A. in his malady espoused her, and died the 15th day after, and so A. is a bastard; and the other said that she was enseint by W. and not by H. and so at issue; quod mirum! that this issue was suffered; for in anno 41 E. 3. fo. 7. Thorp would not suffer the issue to be taken, whether she was enseint by her baron the day of his death or not, but whether she was enseint the day of his death or not; quod nota. Br. Bastardy, pl. 5. cites 44 E. 3. 10.

9. Issue was tendered that J. N. was born out of any espousals; and the other said that he was born in espousals between J. his father and A. his mother, prist, &c. and the other e contra. Br. Bastardy, pl. 6. cites 47 E. 3. 14.

[227] 10. Scire facias to execute a fine. The case was, that the feme to whom the plaintiff made herself heir, took baron and had issue a daughter, the plaintiff; and after took other baron, leaving the first baron, and had issue a son now tenant; per Richill, if the first baron was within the seas the son is a mulier, and so see that the second espousals are void, and the son shall be taken for the son of the first baron; by which the party said that the first baron, after that he had issue the daughter, went beyond sea, and there remained years and days, within which time the feme married another, and had issue the son, so the daughter heir, and not the son; and the other said that the son was mulier, prist; and the other demurred, because he did not answer the special matter; quære. Br. Bastardy, pl. 8. cites 7 H. 4. 9.

11. Ne unques accouple in lawful matrimony, is no plea but in dower or appeal, and not to bastardize any man; but he shall plead bastardy expressly, generally, or specially. Br. Bastardy, pl. 9. cites 11 H. 4. 78.

12. Note,

12. Note, per Hull, bastardy is no plea *in trespass*, but *shall conclude to the franktenement*; for if this shall be a plea, then writ shall be awarded to the bishop for the trial of it, which was never seen in trespass. *Quod non negatur*. Br. Bastardy, pl. 14. cites 14 H. 4. 37.

13. Scire facias to execute a fine of remainder tailed to K. his mother, and to the heirs of her body, and that J. F. married K. and that he is issue of her body, &c. Per Hales, you ought not to have execution; for before these espousals K. was *grossly enseint by J. with this plaintiff*, and after J. espoused K. and after K. *espoused herself from her baron with the said J. in adultery, within which time the plaintiff was born*. Per Rolf, it does not lie in co-nufance of any by whom she was enseint, and though she remains in adultery, yet when the infant is born he shall be the son of the baron. Per Strange, a bastard is nullius filius, and this matter is only argumentative to prove him a bastard, for he *ought to conclude, and so bastard*; for a bastard is filius populi, and has no father certain. Br. Bastardy, pl. 26. cites 1 H. 6. 3.

14. Note, by the best opinion, that *where espousals are pleaded* between a man and a woman, and that they had issue R. within the espousals, the *other shall not say that he is bastard generally*; per Marten & Paston J. clearly. Br. Bastardy, pl. 45. cites 10 H. 6. 23.

15. In trespass the defendant pleaded villeinage in the plaintiff, and he said that he was a bastard; per Markham, to this he shall not be received; for *espousals* were had between the father and mother at D. which *continued all their lives, within which time the plaintiff was born*; sed non allocatur, for all this may be true, for it may be that the father was 7 years beyond sea, within which time he was born, and therefore he *said, and so mulier*; & non allocatur, *without saying further and not bastard*; quod nota, and nothing was entered but mulier, and not bastard. Br. Bastardy, pl. 20. cites 19 H. 6. 17.

16. Where *bastardy was pleaded in the plaintiff in whom the defendant had pleaded villeinage*, and the defendant said that the *espousals were at D., &c. which continued all their lives*, within which time the plaintiff was born; & non allocatur; by which he concluded over, *and so mulier, and not bastard*, and prayed that all be entered; & non allocatur; for *nothing was entered but mulier, and not bastard*. Br. General Issue, pl. 13. cites 19 H. 6. 17.

17. Note, per Ashton and Moyle, where a man brings ** detinue of charters*, and makes to himself title, *as heir in tail of the body of the father and mother*, and that the tenements were given by the same charters, in this case it is a good plea for the defendant to say, *that before the said T. and A. father and mother of the plaintiff, were espoused, this same T. at St. D. in another county, espoused one K. such a day and year, which espousals continued all their lives, and after the said T. espoused the said A. at B. who had issue the plaintiff, and after the said A. died, and the said T. died, living the said K. and demanded judgment si actio*; and per Ashton and Moyle, it is a good plea to plead this special bastardy in this personal action;

* In this action it is no plea that the plaintiff is a bastard, but his challenge shall be entered, and he shall answer. Br. Bastardy, pl. 15. cites 38 E. 3. 62.

for he intided himself as heir in tail, and therefore a good plea, and shall not say generally bastard, * for then he shall not have the visne of both counties, but here he shall have it of both counties; but the plaintiff demurred, & adjournatur. Br. Bastardy, pl. 1. cites 35 H. 6. 9.

18. Where in *precipe quod reddat* against two, the one pleads that the demandant is a bastard, and the other pleads a release in bar, if the bastardy be found, and the release not, the plea of bastardy does not go to all, but the other shall lose his moiety, and he who pleaded bastardy shall save his moiety; for in plea real each may lose his part, or save his part, per Prisot; but per Moile, the bastardy found shall serve both; *quare inde*. Br. Bastardy, pl. 24. cites 37 H. 6. 37.

19. In trespass the pleading was, that the defendant was a bastard, inasmuch as his father and mother were cousins within the degrees of marriage, and therefore were divorced, and there it is agreed by the justices, that the divorce *causa consanguinitatis* makes the issue, had before the divorce, a bastard, and the divorce was pleaded without shewing how they were cousins, and in what degree, and did not plead the record certain, but *quod divorfabant' causa consanguinit' prout patet de recordo*, and yet well. Br. Deraignment, pl. 10. cites 8 E. 4. 28.

See tit.
Trial (P)

(I) Trial.

[1. 18 E. 1. Libro Parliamentorum 2. upon the petition of William de Valenciis and his wife, to have the bull of the pope directed to the archbishop of Canterbury allowed for the examination of a sentence of legitimization of Dionise the son Willielmi de Monte Canisio; upon oyer of the bull it is there said, *quod bulla illa finaliter tendit ad jus successionis hæreditariæ terminandum, cum de successione hæreditaria nemo debeat cognoscere nisi curia regis, vel curia ecclesiastica ad mandatum curiæ domini regis, & etiam si bulla procederet, manifeste esset contra consuetudinem hætenus in regno usitatam, & quia dominus rex nuper providit quod appellationes non fiant vel causæ agentur in curia christianitatis de iis, quæ a curiis regis ibi sunt demandata, propter multa inconvenientia quæ exinde sequerentur, & etiam quia placita de successione ita ordinata se habent, quod primo per brevia domini regis incipere debent in curia regis, & de curia illa, si necesse fuerit, mitti ad curiam christianitatis, & non e converso, & quia multa placita & innumerabilia, temporibus retroactis in curia regis placitata, & etiam judicia super eisdem, reddita irritarentur, & reversarentur si bulla ista procederit, &c. therefore disallowed.]*

(K) *How it shall be tried; and how not; and by whom.*

[1. *General bastardy* ought to be tried *by the bishop*, and not per pais. 18 E. 4. 30.] But special bastardy shall be

tried per pais, and not by certificate of the ordinary. Br. Bastardy, pl. 18. cites 21 E. 3. 39. In bastardy it was in issue if he was born before the espousals, or not, and it was tried per pais, and so * see that this is *special bastardy*, which shall always be tried per patriam, and general bastardy by certificate of the bishop. Br. Bastardy, pl. 17. cites 38 E. 3. 39 E. 3. 31. and 38 Aff. 24. See tit. Trial (P) pl. 1. 22, 23. 32. and the notes there.

[2. The *ordinary* cannot try bastardy, without a command by the king's writ, upon a suit in a temporal court. Da. 1. Bastardy, 55. 39 E. 3. 31. b. per Thorpe.] * [229] Before the stat. of Merton, cap. 8. gave the king's writ

of bastardy, it was used, in this case, to write to the bishop to certify upon this plea, and the prelates answered, that they could not answer to this writ, &c. and therefore always since it has been used to inquire this issue per patriam, and e contra where bastardy is alleged generally, and so *special bastardy* shall be tried per pais, and *general bastardy* by the bishop; per Scroope. Br. Bastardy, pl. 29. cites 11 Aff. 20.

[3. When issue is joined upon bastardy before it shall be awarded to the ordinary to be tried, proclamation shall be made thereof in the same court, and after the issue shall be certified into chancery, where proclamation shall be made once in every month, for three months, and after the chancellor shall certify is to the court where the plea is depending, and after it shall be proclaimed again in the same court, that all those, whom this plea concerns, should go to the ordinary to make their allegations. 10 H. 6. cap. 11.]

[4. If the bishop certifies bastardy, unless this comes in at the misfe of the parties, † [and by process] this is nothing to the purpose. 7 H. 6. 32. b.] † So it is in the Year-book.

5. In assise it was agreed, that the assise may find bastardy by verdict against the plaintiff or defendant, and this in their verdict at large, as it seems; but if bastardy be pleaded, then it shall be sent to the bishop to certify it; quod nota, diversity. Br. Bastardy, pl. 28. cites 8 Aff. 5.

6. Mordancestor, the tenant pleaded bastardy in the demandant, this shall be certified by the bishop of the diocese where the writ is brought, though the demandant said that mulier, and born in another diocese; for he may bring his proofs there. Br. Bastardy, pl. 33. cites 25 Aff. 7.

7. Every bastardy, general or special, in assise alleged, shall be tried by assise by the law; per Tank. Br. Bastardy, pl. 36. cites 28 Aff. 24. In assise where issue is not joined of bastardy, but the as-

sis awarded at large, there they shall not write to the bishop to certify it, but it shall be tried by the assise. Br. Bastardy, pl. 38. cites 39 Aff. 4.

8. In assise, they were at issue upon *special bastardy*, and it was tried by the assise; and per Tank, every bastardy pleaded in assise shall be tried per pais, and because the court saw by inspection

tion that the *tenant was within age*, so that the matter alledged by the plaintiff could not be a nient dedit of him, the assise was taken at large, and *first inquired of the bar, and further of the seisin and disseisin*, and found for the plaintiff, and he recovered. Br. Assise, pl. 351. cites 38 Ass. 24.

9. Where writ is to the bishop to certify whether bastard or mulier, the *parol is without day till the bastardy be certified*; for the *bishop is judge, and shall not be compelled to any day certain*. Br. Bastardy, pl. 16. cites 40 E. 3. 39. and 38 E. 3. li. Assise 30.

10. In assise, bastardy was tried *by the bishop, in whose diocese the land is, and in time of the vacation of the bishoprick*, writ shall issue to the guardian of the spiritualties, to certify it; quod nota. Br. Bastardy, pl. 39. cites 41 E. 3. 29.

11. In formedon, bastardy was alledged *in one who was mesne in the conveyance*, by which the demandant claimed, and because he was dead, and was no party to the writ, it was tried *per pais*, and not by certificate of the bishop. Br. Bastardy, pl. 3. cites 42 E. 3. 8.

[230] 12. In assise, the *tenant was alledged to be born at S. in the same county, out of any espousals*, where he entitled himself as heir; and the *tenant said that he was born within the espousals at D. in a foreign county*, and it was tried by the assise. Br. Bastardy, pl. 40. cites 46 E. 3. 3.

13. In *cui in vita* by the heir the *tenant pleaded bastardy*; and the demandant alledged *special espousals in another county*; judgment if he shall be received to alledge bastardy; and the other alledged *that this amounted to mulier, prist quod non, and writ was awarded to the bishop where the land was, and not where the espousals were alledged*. Br. Bastardy, pl. 7. cites 7 H. 4. 7.

(L) In what *Actions* it may be tried. [*And how it must be certified.*] pl. 3.

* Br. Bastardy, pl. 14. cites 14 H. 4. 37. [1. I T may be tried by the bishop in an action of *trespass*, or other personal action, as well as in actions real. * 14 H. 4. 36. † 19 H. 6. 17. b.]

[but it should be (36) as in Roll] S. C. says nota by Hull, that bastardy is no plea in trespass, but shall conclude to the franktenement; for if this shall be a plea, then writ shall be awarded to the bishop for the trial thereof, which never was seen in trespass; quod non negatur. — But ibid. pl. 41. cites 3 E. 4. 11. that in trespass they were at issue upon bastardy, and it was tried by certificate of the bishop. Quod nota in action personal. — And ibid. pl. 42. says, note, that at this day issue taken of bastardy in action personal shall be tried by the bishop, as well as in plea real; and yet in ancient times it was tried by the county in action personal, and by the bishop in action real. Br. Bastardy, pl. 42. cites 4 E. 4. 35. † Fitzh. Trial, pl. 6. cites S. C. — See tit. Trial (P) pl. 30 & 31. S. C. and the notes there.

† Br. Bastardy, pl. 35. cites S. C. [2. It may be tried in an *assise* as well as in a *præcipe quod red-dat, or other writ in the right*. 38 E. 3. 27. adjudged, † 38 Ass. 14. adjudged, 27 E. 3. 82. b.]
— Br. Certificate de Aveque, pl. 27. cites S. C. — See tit. Trial (E. a) pl. 1. S. C. and the notes there.

[3. Bas-

[3. Bastardy ought to be *certified under the seal of the ordinary*; for it is *not* sufficient to be certified under the seal of the *commissary*. 20 H. 6. 1.]

Br. Certificate de Evêque, pl. 2. cites S. C.

4. Bastardy was *certified in a replevin*, and therefore it seems that the action is in the realty, and the certificate of mulier between the plaintiff in the assise and a stranger in the replevin was a good *estoppel between the tenant in the assise, who was a stranger, and the plaintiff in the assise*. Br. Bastardy, pl. 19. cites 7 H. 6. 37.

5. Where a man is a mulier, there must be a special bastardy certified; for that the bishops own such a one to be legitimate; per Holt Ch. J. 5 Mod. 420. Mich. 10 W. 3.

(M) *Who shall take Advantage of the Trial of Bastardy. And of what Trial, and e contra.*

Fol. 362.

[1.] If a man be *certified a mulier by the ordinary*, this is *not any estoppel*, because he may be a *bastard by our law notwithstanding*; for if he was *born before marriage, and the marriage was * had afterwards*, the ordinary will not certify him to be a bastard, but a mulier. † 18 E. 4. 29. b. 30. † 11 H. 4. 84. 18 E. 3. 33. b. 34. adjudged. 30 E. 3. 8. b. 26 Aff. 64. § 7 H. 6. 37. But judgment shall be given in the action in which the certificate is made, according to the certificate, || 40 E. 3. 40. 30 E. 3. 8. b. adjudged. 18 E. 3. 34. admitted, and 34. thereafter adjudged. Contra ¶ 7 H. 6. 37. b.]

* [231]

† Br. Bastardy, pl. 43. S. P. cites 18 E. 4. 28. [but misprinted for 29. b. 30.]

† Fitzh. Bastardy, pl. 6. cites S. C. — Br. Bastardy, pl. 12. cites S. C.

§ Br. Bastardy, pl. 19. cites S. C. — Br. Certificate de Evêque, pl. 9. cites S. C. — Br. Estoppel, pl. 78. cites S. C. — Fitzh. Estoppel, pl. 21. cites S. C.

|| Br. Bastardy, pl. 2. cites 40 E. 3. 39. S. C.

¶ Br. Estoppel, pl. 78. cites S. C. — Br. Certificate de Evêque, pl. 9. cites S. C. — Br. Bastardy, pl. 19. cites S. C. — Fitzh. Estoppel, pl. 21. cites S. C. — Br. Bastardy, pl. 12. cites S. C. accordingly per Tirwhit, and therefore a *stranger to this record may bastardize him*. — Contra if he had been *certified bastard* by the bishop; this *shall estop privies and strangers*; for he who is a bastard by the ecclesiastical law is bastard by our law. Ibid. — But Brooke says, *quere* of this opinion of mulierty; for Brooke says, it seems that the ordinary shall not certify at the common law by the law of the church, but by the law of England. And Rolfe relinquished the estoppel, and pleaded that he was born within the espousals at D. and so to issue. Ibid. — In assise, bastardy was *certified in a replevin*. The certificate of mulierty between the plaintiff in the assise and a stranger in the replevin, was a good *estoppel between the tenant in the assise, who was a stranger, and the plaintiff in the assise*; and Brooke says, see here that the opinion of Tirwhit is not law; for here it was adjudged a good estoppel. Br. Bastardy, pl. 19. cites 7 H. 6. 37.

Writ of *entry sur disseisin* by the heir. The *tenant said that he was a bastard*, and the other said that mulier, and not bastard, by which it was sent to the bishop to certify, and day given to the parties till now, and the *bishop certified that mulier*, and the *demandant prayed seisin of the land, and had it*, notwithstanding that Fencot alleged that the usage had been in all actions, except dower, that the parol shall be put without day, where it is sent to the bishop to certify, &c. and the plea to be revived again by re-summmons; and yet non allocatur, but judgment ut supra. Br. Bastardy, pl. 2. cites 40 E. 3. 39.

In mortdancer the *tenant said that the demandant was born out of any espousals*. The demandant said that this is tantamount as bastard, whereas he has here certificate of the bishop that he is mulier, and yet the tenant had the plea. Quere. Br. Bastardy, pl. 29. cites 11 Aff. 20.

[2. If *between strangers* another be tried a bastard per pais, this *will not bind him who is so tried*, because he is a stranger to the trial

Br. Trial, pl. 9. cites 41 E. 3. 37.

and

[and so are all the editions, but misprinted, and should be 40 E. 3. 37. b. pl. 11. by Finchden opiter.]—Fitzh. Trial, pl. 44. cites S. C. but S. P. does not appear there.

[3. But *otherwise* it is of him that is privy to the attainr. Doctor & Student 68. b.]

* Fitzh. Trial, pl. 44. cites S. C. but S. P. does not appear there.
—Br.

[4. If a man be *certified a bastard* by the ordinary, he shall be *perpetually bound against all the world* to avoid [have] a contrary certification, and because it is the highest trial thereof. Doctor & Student 68, and shall continue of record. * 40 E. 3. 38. † 11 H. 4. 84.]

Trial, pl. 9. cites 41 [but should be 40] E. 3. 37. b. S. C. & S. P. † Fitzh. Bastardy, pl. 6. cites S. C.—Br. Bastardy, pl. 12. cites S. C.—S. P. by Littleton. Br. Bastardy, pl. 43. cites 18 E. 4. 28. [29. b. 30.]

Fitzh. Bastardy, pl. 6. cites S. C. [5. And so if the party, who is certified a bastard, is a *stranger to the suit*. 11 H. 4. 84.]
—Br. Bastardy, pl. 12. cites S. C.

Fitzh. Trial, pl. 6. cites Mich. 10 H. 6. 17. [6. [So] If a man be *certified a bastard* by the ordinary in a *personal action*, he shall be bound perpetually, as well as in actions real. S. C.—Br. Bastardy, pl. 20. cites S. C.—Br. Villeinage, pl. 20. cites S. C.—Br. General Issue, pl. 13. cites S. C.]

† [232]
See pl. 1. and the notes there.
§ There is no such folio in the Year-book.

‡ [7. If a man be *certified a mulier* by the ordinary, in an action between himself and J. S. this *shall not bind strangers* thereto; but they may say that he is a bastard. 23 Aff. 5. adjudged. 27 E. 3. § 82, b. adjudged.]

(N) At what Time the Trial shall bind,

[1.] If a man be certified a bastard, yet this shall *not bind before judgment*, given thereupon, in an action between him and the other. 18 E. 3. 34.]

In trespass, they were at issue upon *bastardy*, and it was tried by certificate of the bishop, quod nota, in action personal; and by the best opinion, after the certificate the plaintiff may be nonsuited; and then per Moile J. this certificate is no conclusion at all of the bastardy, no more than after discontinuance. Br. Bastardy, pl. 41. cites 3 E. 4. 11.

[3. But after certificate of bastardy in the tenant, if the tenant dies, by which the writ abates, yet the certificate shall stand in force. 18 E. 3. 34.]

(O) Bastardy proved. When.

1. *FUSTUM non est aliquem antenatum mortuum facere bastardum, qui totq tempore suo pro legitimo habebatur.* 8 Rep. 101. For by the law of England, by continuance of possession, and dying peaceably seized, he is adjudged heir to his father; and by his dying without issue, the mulier shall have the land. Ibid. cites S. C.

2. A man had issue by his feme and was divorced, and after he took another feme and had other issue; the first issue sued in the spiritual court to repeal the divorce after the death of his father, and to bastardize the issue of the second feme, and he had prohibition; for the title and the descent were comprised in the libel as was agreed there. Br. Prohibition, pl. 9. cites 12 H. 7. 24.

3. But a sentence given for a marriage may be repealed after the death of the parties, and so ex obliquo bastardize the issue. Jenk. 289. pl. 26.

4. The rule that a man shall not be bastardized after his death, holds only in case of bastard eigne and mulier puisne, viz. such a bastard as is born before the espousals of a father and mother, who marry afterwards, and said that the rule extended to no other; per cur. 1 Salk. 120. pl. 1. Hill. 6 W. 3. B. R. Pride v. Earl of Bath & Montague.

(P) Where they shall take by Grant or Devise. [233]

1. LORD Powis gave certain lands to *Thomas Gray his son, by him begotten on the body of Jane Orwell*, yet it was a good purchase and gift to Thomas Gray, because it was *his known name*; cited by Dyer J. 3 Le. 49. pl. 69. D. 313. b. pl. 93. Trin. 14 Eliz. Gray's case, S. C. & S. P. admitted. — S. C. cited per cur. 6 Rep. 77. a. — And. 70. pl. 143. Mich. 22 & 23 Eliz. 3. P. obiter.

2. H. the 8th seized of certain lands, by letters patents granted them to T. Holt for life, *remainder to John Holt his son* who was in truth a bastard. Dyer thought it a good purchase in law, as well in the case of the king as of a common person, and if the king had granted the land to *John Holt*, without naming him son, the same had been a good purchase; but if he had named him *John the son of Thomas* without giving him a surname, there the purchase should not be good if he were a bastard; because he hath not *nommen cognitum*, as where he hath a surname. 3 Le. 48. pl. 69. Mich. 15 Eliz. C. B. Anon.

3. 11. — A bastard supposed to be the son of such a father, is not in law his son; but when he has the reputation and pretence of being his son, that pretence is enough to give the law such notice of him, as to enable him to purchase by that name; per Holt Ch. J. 7 Mod. 109. Mich. 1 Ann. B. R.

D. 223. pl.
29. Pasch.
15 Eliz.
Lingen's
case.—
S. C. cited
Cro. E.
353. in pl.
17.—

Jenk. 239. pl. 21. S. C. and if the will had directed an estate to be made by the feoffees to A, his daughter, it had been good because of the plain intent of testator.

Confidera-
tion of *natural*
affection,
will not raise
an use to a

bastard; for though there is natural affection between them, yet the *raising the use is a constitution of the law*, and therefore the use shall never arise. Jenk. 47. pl. 90.—D. 374. pl. 16. S. C.

3. L. made a feoffment to his own use, and after devised that his feoffees should be seised to the use of his *daughter A.* who in truth was a bastard, and yet this is a good *devise* of the land by intention; for by no possibility they can be seised to her use; cited by Doderidge. Poph. 188. as the case of 15 Eliz. D. 323.

4. A man cannot raise an use to a bastard by such name, though it comes in the deed *by way of remainder*; agreed. And. 79. pl. 145: Trin. 19 Eliz. Gerard v. Worfely.

5. If A. has issue a bastard and mulier both named John, and he gives to his son called *John*, the bastard shall take; but if to his son *John*, the mulier shall take; per Clark J. Mo. 230. pl. 367. Hill. 29 Eliz. in the exchequer.

6. If the *issue of a bastard purchase land, and dies without issue*. Though the land cannot descend to any heir of the part of the father, yet to the heir of the part of the mother it may; so if the bastard was *attainted*; for the heirs of the part of the mother make not any conveyance by the bastard. Arg. Noy, 159. in case of the King v. Boraston & Adams.

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In the same
case reported
by Croke,
the limita-
tion was to
himself for
life; then of
such issue,
&c. who by
common
supposition

or intendment *should be reputed to be begotten*, &c. no issue being born till afterwards; Gawdy thought the limitation good, though the issue was *not in esse* at the time. Popham agreed that such a remainder to a bastard in esse might be good, because he is a *person known*, and may be in time reputed the son of another, but thought it could not be good to a bastard before he is born, and he cannot gain the reputation or name at the instant of his birth, and if he cannot take then, he never shall after; for the law will not expect longer, and the limitation to one and the issues of his body, is always to be *intended lawful issue*; and the law will never regard any other. Fenner J. inclined to that opinion, and said they had conferred with divers justices, and that the greater opinion of them was, that a *remainder to his first reputed son or bastard* is not good; for the law favours not such a generation, nor will suffer such limitation for the inconveniencies that might arise thereupon. Cro. E. 309. pl. 34. Mich. 38 & 39 Eliz. B. R. Blodwell v. Edwards.—Mo. 430. pl. 602. S. C.

A woman might give lands in *frank-marriage* with her bastard. Noy, 35. cites Plowden.

8. If an obligation be made to *J. S. filio & heredi G. S.* where indeed he is a bastard; yet this obligation is good. Bacon's Elements, 91.

9. Devise to a son who is a *reputed son* is good; per Newdigate J. 2 Sid. 149. cites a case in 1655. Sir Jo. Mitchel v. Sayers.

10. Illegitimate son may take by the name of the reputed father after he has acquired a certain name *by reputation*; per Raymond J. Raym. 412. Mich. 32 Car. 2. B. R. obiter.

11. In

11. In case of a bastard the *reputative name* must be *shown* to make the *grant good*. Arg. Parl. Cases, 222. in case of the King v. Bishop of Chester and Pierce.

12. *A. devised 3000l. to all the natural children of B. his son by J. S.* Some were born before, and some after. Ld. C. Parker decreed, that the natural children born after the will shall not take share of the 3000l. for they cannot take till they have gained a *name by reputation*, and therefore if I grant to the issue of *J. S. legitimate or illegitimate*, yet a bastard shall not take. Wms.'s Rep. 529. Hill. 1718. Metham v. the Duke of Devon.

For more of Bastard in general, see Descent, Grants, Heir, Trial, and other proper titles.

(A) Berwick.

[1. BERWICK is not *part of England*, nor governed by the laws of England. 7 Rep. 23. b. Trin. 6. Jac. in Calvin's case.]

adjudged, that the plaintiff *nil capiat per breve*, because the court here had no jurisdiction. 387. cites 2 E. 3. Obligation 15.

Debt was brought on a bond made at Berwick, and it was Arg. Godb.

2. *Habeas corpus* was awarded to the mayor of Berwick, and he was fined and imprisoned for his contempt in refusing to obey it. Cited Cro. J. 543. pl. 3. Mich. 17 Jac. B. R.

3. *Covenant* to repair houses in Berwick was *tried* in Northumberland. Lev. 252. Mich. 20 Car. 2. B. R. Crispe v. the Mayor, &c. of Berwick upon Tweed.

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Raym. 173.
S. C. resolved for the plaintiff.—
Mod. 36. pl.

88. S. C. adjournatur. — Sid. 381. pl. 14. Jackson, &c. v. Mayor of Berwick, adjudged, on great debate, for the plaintiff. — Vent. 58. S. C. the court ruled the venire to be well awarded.

4. Berwick is *part of Scotland*, and bound by our *acts of parliament*, because conquered in E. 4th's time; but the course is to *name it expressly*, because it is out of the realm, and not like to Wales. Arg. Vent. 59. Hill. 21 Car. 2. B. R. in case of Crispe v. the Mayor of Berwick.

5. Berwick upon Tweed is *not within any county*, has no *sheriffs*, the mayor there *makes, executes, and returns all process*, and generally, their suits there are commenced and ended in their own courts; but in a *cause of land* there, if commenced here, there is a suggestion on the roll, that *breve domini regis ibi non currit*, as it is in Wales,

Beyond Sea:

Wales, and on this reason an *attachment* could not be granted against the mayor, because no sheriff to execute it; but a *tipstaff* was sent. 2 Show. 365. pl. 355. Trin. 36 Car. 2. B. R. the Mayor of Berwick's case.

For more of Berwick in general, see *Tristal*, and other proper titles.

Beyond Sea.

(A) What is. And the Effect of Persons being beyond Sea.

3 Rep. 99. 1. **B** EING beyond sea will *excuse* an heir not coming in to be admitted to a * *copyhold*; so from *outlawry*; so from a *descent that tolls his entry*; so from a *non-claim on a fine* by the common law; per 4 justices against one. Cro. J. 226. pl. 1. Mich. 7 Jac. B. R. Underhill v. Kelsey.

S. P. held Cro. J. 101. pl. 32. Mich. 3 Jac. B. R. Whitton v. Williams.——But going beyond sea after the first proclamation made will not excuse the heir of a copyhold. Ibid. 100. b.

It was agreed by the counsel for the defendant, that if the going beyond sea had been after the descent, it would have bound the heir. Cro. J. 101. pl. 32. in S. C. of Whitton v. Williams.——So if a man be disseised, and afterwards goes beyond sea, and a descent is cast afterwards, this shall toll his entry. 3 Rep. 100. b. cites Litt. f. 440. * Cited 3 Mod. 224.

2. A. having issue two sons, B. and C. infants, devised to B. 100l. and made D. executor. B. about 5 years *since went beyond sea*, leaving a note that he would not return in 7 years, but it is not known if he be living or not. C. as next of kin, suggesting B. to be dead, *takes out administration*, and brings a bill for the legacy. Decreed the 100l. and interest since B. went, to be paid to C.—C. giving security to repay it to B. if he should ever return, which security is to stand for 3 years, and no longer, but the plaintiff's own security to stand for ever. Fin. R. 419. Hill. 31 Car. 2. Norris v. Norris,

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3. *Executor in trust* being gone a soldier to the Indies, and the plaintiff making affidavit of it, that he knew not if he was living or dead, nor where to find him to *serve him with process*, ordered on motion, that though he was a *necessary party defendant*, the plaintiff might proceed against the other defendants without prejudice, for not bringing him to hearing, and plaintiff had a decree. Per Jeffries,

series C. Vern. 487. pl. 473. Mich. 1687. in a note at the end of the case of Walley v. Whaley, Gaudy, and Warner.

4. *Dublin*, or any other place in Ireland, is beyond sea, within the meaning of that clause in the *statute of limitations*; per Holt Ch. J. Show. 91. Hill. 1 W. & M. Anon.

5. Defendant being beyond sea did not avoid the *statute of limitations*. Show. 98. Trin. 2 W. & M. Hall v. Wyborn.

The defendant's being beyond sea

does not hinder or excuse the plaintiff for not suing within the 6 years. Show. 341. Mich. 3 W. & M. Cheveley v. Bond. — But now 4 & 5 Ann. cap. 16. alters the law in this case of the defendant's being beyond sea. — And see 5 Geo. 2. cap. 25. as to proceedings in chancery in such cases.

6. A. who was *resident at Tunis*, sued J. N. at law, and J. N. brought a bill against A. and had an order, that *service on defendant's attorney* should be good; but defendant's attorney shall not be allowed to answer for the defendant without oath, though it was insisted that no commission could be sent to Tunis, and that it was the same as if the defendant lived in an enemy's country; but per cur. the English have a consul at Tunis, and commissions have gone there by way of Leghorn, and so denied the motion. Wms.'s Rep. 523. Mich. 1718. Anon.

But if there had been a general letter of attorney to one to appear in and defend suits, the court would have ordered such attorney to appear for the principal, and that service on him should be good service. *Ibid.*

pal, and that service on him should be good service. *Ibid.*

(B) Of Things done beyond Sea. And Pleadings.

1. IF an obligation bears date at *Cane in Normandy*, the obligee may bring action in England, and declare in *Cane in the county of S. in a place called Normandy*. Quod nota bene. Br. Obligation, pl. 87. cites 48 E. 3. 2.

In debt upon an obligation the defendant said that it was made

and prayed that the plaintiff be examined, and it was denied per cur. For it was said that because it bore date at large, without place certain, it suffices, though it was made at Rome, or other place, and may be alleged to be made here. Br. Examination, pl. 31. cites 21 E. 4. 74. — Windham J. said that a bond dated at Paris in France may be laid at Paris in France in *Islington*; but where it is dated at Paris in France, within the kingdom of France, it is not triable at all; and that so it had been held by good opinion. 2 Keb. 315. pl. 26. Hill. 19 & 20 Car. 2. B. R. in case of Freeman v. King.

after le mere,

2. Debt upon an obligation. The plaintiff counted that it was made at B. in Kent, where, in truth, B. is in Normandy *ultra mare*, and it was for him to serve in the war in France; where it was said per Belk. that causes of war are determinable before the constable and marshal; but there it was admitted, that of deed or contract made in England for service to be done beyond sea, or upon the sea, as to go to Rome, or to serve as a mariner, &c. the action lies in England. Br. Jurisdiction, pl. 15. cites 48 E. 3. 3.

S. P. and the defendant said that no such place called B. is in the county of Kent; and therefore Brooke says it seems it had been

counted at a place called B. in such a will in the county of Kent. And where the indenture was to serve in the war in France, the party may show how he served there, and the other may allege payment without showing acquittance. Brooke says, quære if the defendant says that the plaintiff did not serve him, prout, &c. where this shall be tried, by reason that the act shall be done *ultra mare*. Br. Dette, pl. 46. cites S. C. — Br. Lieu, pl. 16. cites 48 E. 3. 2, 3. S. C.

good to have

* was to serve in the war in France, the party may show how he served there, and the other may allege payment without showing acquittance. Brooke says, quære if the defendant says that the plaintiff did not serve him, prout, &c. where this shall be tried, by reason that the act shall be done *ultra mare*. Br. Dette, pl. 46. cites S. C. — Br. Lieu, pl. 16. cites 48 E. 3. 2, 3. S. C.

3. A bond made in France is suable in England. Br. Obligation, pl. 7. cites 20 H. 6. 23. and says this seems [to be] where it does not bear date at any place certain.

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be sued in England. Jenk. 10. pl. 18. cites 6 Rep. Dowdale's case. — Where the plaintiff de-

So a bond bearing date at Amiens in France may be sued in England. Jenk. 10. pl. 18. cites 6 Rep. Dowdale's case. — Where the plaintiff de-

clared on a bond, and set forth that it was made at Bourdeaux in France, this court of B. R. never had any jurisdiction, because the matter did arise in a foreign nation. Carth. 12. in case of Jennings v. Hankyn.—Jeak. 31. pl. 60. makes the difference between Amiens in France and Amiens in regno Francie; and that in the last case it cannot be sued in England.

Upon a bond which bears date in Normandy a man shall not have action here; but in case of *will dated there and proved here*, it is good. Arg. Godb. 387, 388. cites Testament, 16. per Pole.

Generally speaking the deed, upon the oyer of it, must be consistent with the declaration; but in these cases *propter necessitatem*, if the inconsistency be as little as possible, it is not to be regarded, as where a contract was of a voyage from Fort St. George to Great Britain, this imports Fort St. George to be different from Great Britain. The plaintiff declared that the defendant continued at Fort St. George in *Indibus Orientalibus*; and upon oyer of the deed it bore date at Fort St. George, yet it was adjudged for the plaintiff. 10 Mod. 255. Trin. 13 Ann. B. R. Parker v. Crooke.

But in the declaration a place in England must be alledged *pro forma*. 10 Mod. 255. Parker v. Crook.—Co. Litt. f. 440. 261. b. S. P.—Jo. 68. Arg. Godb. 388. cites 1 E. 3. 1. 18. 8 E. 3. 51. and 13 H. 4. 5, & 6. and 6 R. 2. 2. and 20 H. 6. 28, 29. 20 E. 4. 1. 21 E. 4. 22. Lutw. 950. Davis v. Yale.—Such place shall be intended in England, and judges ought to maintain the jurisdiction of the court, if the case be not evidently out of the jurisdiction. Lat. 5. in Ward's

4. In debt upon an obligation, that the defendant should set over 18d. wages by the day of a spire of Calice, he pleaded that he had done it accordingly at Calice in the county of Kent; and Jenney imparled, and therefore it seems that upon obligation made beyond sea, the plaintiff may alledge the deed to be made at the same place in such a county in England. Br. Count, pl. 42. cites 15 E. 4. 14.

5. If a man be bound to pay money, or such like, beyond sea, the deed is single, and the condition void, because it cannot be tried in England; and where a man pleads a plea triable beyond sea, this is no plea, and the other may demur. Br. Conditions, pl. 170. cites 21 E. 4. 10. per Brian Ch. J.

6. A release made beyond sea is void. Br. Trials, pl. 58. cites 21 H. 7. 33. per Fineux Ch. J.

7. Action upon the case was brought in London by A. B. that whereas he was possessed of certain wine, and other stuff, and shewed certain in such ship *ad valentiam*, &c. and did not shew place certain where he was thereof possessed, and yet well; and alledged that the defendant such a day, year, and place in London promised for 10l. that if the said ship and goods did not come safe to London, and be landed there, that then he should satisfy to the plaintiff 100l. and that after the ship was robbed in the trade upon the sea, by which he brought the action for not satisfying, and the truth was that the bargain was made beyond sea, and not in London; but in action upon the case upon assumption, &c. which is not local, the place is not material no more than in debt; for he alledged that the said goods in the parish of St. Dunstan, in the East, London, before they were put to land or discharged, were carried away by persons unknown, &c. and the action lies well in London, though they were lost upon the high sea. Br. Action sur le Case, pl. 107. cites 34 H. 8.

8. Ouster le mere is a good plea upon the statute of 23 Eliz. Skin. 99. Hill. 35 Car. 2. B. R. in case of the King v. Hurst.

9. A fine was levied and acknowledged at Orleans in France, and was certified and allowed for good by the common law here in England. Godb. 262. pl. 359. Mich. 10 Jac. C. B. Coke Ch. J. cites it as allowed for good law in Sir Robert Dudley's case.

10. No *replevin* lies for goods taken beyond the seas, though brought hither by the defendant afterwards; per Pollexfen Ch. J. Show. 91. Hill. 1 W. & M. Nightingale v. Adams.

11. If the *contract* be laid in *London*, and a *collateral matter*, or the thing contracted for, be *done beyond sea*, you need not alledge it done here, in *Warda de Cheap*; per cur. Show. 348. Pasch. 4 W. & M. Mudge v. Bridges.

The plaintiff might have declared that the defendant *apud* *Port St. Da-*

vid's in the *East-Indies*, viz. *apud London*, in *Paroch*, &c. for that was only using *London*, &c. for a place of trial.—10 Mod. 255, 256. Parker v. Crook.

For more of *Beyond Sea* in general, see *Evidence*, *Trial*, and other proper titles.

Bills of Exchange, Notes, &c.

(A) What are Bills of Exchange.

1. **D**EBT against a merchant upon a *bill* by him, *payable at the feast of the purification called Candlemas-Day*; and after judgment for the plaintiff it was moved in arrest thereof, because payment at *Candlemas* is not known in our law; but judgment was affirmed; for that amongst merchants such payment is known to be on the 20th [2d of] Feb. and the judges ought to take notice thereof for the maintenance of traffick. Yelv. 135. Mich. 6 Jac. B. R. Pierfon v. Pounteys.

Brownl. 102. S. C. but seems only a translation of Yelv.

2. A *gentleman travelling beyond sea*, for his education, and who never was a merchant, draws a bill. He is by drawing such a bill become a trader, and within the custom of merchants, as to bills of exchange. Show. 125. Mich. 1 W. & M. in cam. scacc. Witherley v. Sarsfield.

2 Vent. 292. 295. Sarsfield v. Witherley, in cam. scacc. S. C. and judgment accordingly.

and so a judgment in B. R. was reversed. — Carth. 82. S. C. says it was agreed by all the judgments should be reversed accordingly; and that this was upon consideration had of the inconveniences which might ensue, and the suspicion which might increase among foreign merchants upon bills of exchange, if persons who took upon themselves to draw such bills should not be liable to the payment thereof. — Comb. 45. S. C. — Ibid. 152. S. C.

3. Goldsmiths bills are governed by the same laws as other bills of exchange, and every indorsement is a new bill; per Holt Ch. J. 1 Salk. 132. Hill. 5 W. & M. in B. R. Hill v. Lewis.

4. Case upon the custom of merchants, and declares that the defendant *per notam sine bill secundum consuetudinem, promised to pay 60 guineas to the plaintiff, if the plaintiff should be married within 2 months*, and avers that he was married, &c. The defendant demurs. The court inclined against the custom, this not being by way of negotiation, but a note to pay money upon a *mere contingency*,

Skin. 398. Pl. 32. S. C. and the court held it to be ill. — 4 Mod. 242. S. C. and the pleading; judg-

ment was
given for the
defendant;
for to pay
money upon
such a con-
tingency,

cy, which by this artifice they would make equal with a bond, and not set forth any consideration; and they said it is the duty of the judges to suppress * new inventions. Comb. 227. Mich. 5 W. & M. B. R. Pearson v. Garret.

tingency, cannot be called trading, and therefore not within the custom of merchants.

5. The *notes of goldsmiths* (whether they be payable to order or to bearer) are always accounted among merchants as *ready cash*, and not as bills of exchange. Ld. Raym. Rep. 744. at Guildhall, Trin. 7 W. 3. Taffwell & Lee v. Lewis.

6. A goldsmith's note *indorsed* is as a bill of exchange against the indorser. Ld. Raym. Rep. 743, 744. 7 W. 3. before Holt Ch. J. at Guildhall, Taffall & Lee v. Lewis.

7. *Bills of exchange at first extended only to merchant strangers, trading with English merchants*; and afterwards to inland bills between merchants trading the one with the other here in England, and afterwards to all traders and negociators, and of late time to all persons trafficking or not; per Treby Ch. J. 2 Lutw. 1585. Hill. 8 W. 3. in case of Bromwich v. Lloyd.

8. *I promise to pay the bearer 20l. on demand.* Holt Ch. J. seemed to think that this was not a bill of exchange; adjournatur. 12 Mod. 380. Pasch. 12 W. & M. Carter v. Palmer.

9. A bill drawn payable to *W. R. or order*, was ruled to be within the custom of merchants, and such bill may be negotiated and assigned by custom, and the contract of the parties; and an action may be grounded on it, though it is no specialty. 3 Salk. 67. pl. 2. Pasch. 12 W. 3. B. R. Jordan v. Barlow.

Plaintiff de-
clared upon a
custom among
merchants in
London trad-
ing there,
that if a
merchant
signed a note
promising to
pay T. S. or
order so
much, &c.

10. The plaintiff brought an action on a note for money payable to the plaintiff or order, and declared on the custom of merchants, and laid a general indebitatus; and on the general issue entire damages were given. The court held that this is not with the custom of merchants, and being no specialty, no action can be grounded upon it. It was then moved that being void, no damages could be intended given for it; sed non allocatur; for it is not a matter insensible, but void in law. 1 Salk. 129. pl. 12. Pasch. 1 Ann. B. R. Clerk v. Martin.

that he becomes bound by the custom to pay it; this judgment was by nil dicit, and error being brought in B. R. the counsel would have distinguished this from the case of *CLERK v. MARTIN*, which was laid generally between all merchants, whereas this is laid as a special custom in London, and that confessed by the judgment by nil dicit; but per Holt Ch. J. this custom to oblige one to pay by note without any consideration, is void and against law; and judgment was reversed. 1 Salk. 129. pl. 13. Pasch. 1 Ann. B. R. Potter v. Pearson. — 2 Ld. Raym. Rep. 759. S. C. and judgment reversed accordingly. — Ibid. 774. Trin. 1 Ann. BURTON v. SOWTER, S. P. and judgment was stayed after a verdict for the plaintiff.

A note was drawn thus: *I promise to pay to J. S. or order, the sum of 100l. on account of wine bad from him*; J. S. indorses the note to B. who brought an action against the drawer, and declared on the custom of merchants, as on a bill of exchange. It was moved in arrest of judgment upon the authority of *CLERK & MARTIN's* case; but it was answered, that in that case the drawer brought the action, whereas here it is by the indorsee; and that he that gave this note did, by the tenor thereof make it assignable, or negotiable by the words (or order) which amounts to a promise or undertaking to pay it to any whom he should appoint, and that the indorsement is an appointment to the plaintiff. The whole court seemed clear for staying of judgment, and at last took the vacation to consider of it. 6 Mod. 29. Mich. 2 Ann. B. R. Buller v. Cripe. — 1 Salk. 130. pl. 16. S. C. but S. P. does not fully appear. — 2 Ld. Raym. Rep. 757. S. C. adjudged per tot. cur. for the plaintiff.

11. *Pay to me or my order so much*, is a bill of exchange if accepted; and this is the only way to make a bill of exchange, without the intervention of a third person. 1 Salk. 130. pl. 16. Trin. 2 Ann. B. R. Butler v. Crips.

6 Mod. 29. Butler v. Crips, S. C. but S. P. does not exactly appear.

12. 3 & 4 Ann. cap. 9. s. 1. *All notes in writing made and signed by any person, &c. or by the servant or agent of any corporation, banker, &c. or trader intrusted to sign such notes, whereby they or their agents, &c. promise to pay to any person, &c. his, &c. order or bearer, any sum mentioned in such note shall be construed to be by virtue thereof due and payable to any such person, &c. to whom the same is made payable.*

A note written by the plaintiff, and subscribed by the defendant, is a note made and signed by the defendant

within this act; for the signing or subscribing is the lien, and the writing or making is only the mechanical part of it. 3 New. Ab. 606. cites Trin. 6 Ann. B. R. Ash v. Baron.

It was a question whether on this statute the want of consideration of a promissory note can be given in evidence. Two judges were of opinion that it could not, but the two senior judges and Ld. King were of a contrary opinion, and that this act only turned the proof upon the defendant, to shew that no consideration was given for such note, which by the statute is made evidence, but not conclusive evidence of the consideration. G. Equ. R. 154. Mich. 8 Geo. 1. Brown v. Marsh.

* [240] S. C. cited 2 Ld. Raym. Rep. 1396. — S. C. cited 8 Mod. 362. arg. and admitted by the other side.

13. A note was, *I promise to pay 50l. or render the body of J. S. to prison before such day*; it was adjudged to be no negotiable note within the act of parliament, and that an action could not be maintained on that note within that law, because the money was not absolutely payable, but depended upon a contingency, whether he would surrender J. N. to prison or not; cited per cur. 2 Ld. Raym. Rep. 1362. as Mich. 1 Geo. Smith v. Boheme.

14. *I promise to pay to W. 100l. in 3 months after date, value received of the premises in Rosemary-lane, late in the possession of T. R.* Upon a demurrer the court held this clearly a promissory note within the stat. 3 & 4 Ann. cap. 9. and judgment for the plaintiff. 2 Ld. Raym. Rep. 1545. Mich. 2 Geo. Burchell v. Slocock.

15. *Bill drawn on a cashier of a certain company, and for him to pay out of the cash of such a company, is not a bill of exchange, and suable as such; for a bill of exchange is not payable out of a particular fund; and so a judgment in C. B. was reversed.* 8 Mod. 265. Trin. 10 Geo. 1. Jenny v. Heale.

2 Ld. Raym. Rep. 1361. Jenney v. Herle, S. C. and judgment in C. B. was reversed.

reversed in B. R. — S. C. cited Arg. 2 Ld. Raym. Rep. 1482. — So a bill drawn upon B. requiring him to pay C. 7l. every month out of the growing subsistence of the drawer, and place it to his account, was resolved to be no bill of exchange; and so a judgment in C. B. was reversed. 10 Mod. 294. 316. Pasch. 1 Geo. 1. B. R. Josselyn v. Lacier. — S. C. cited per cur. 2 Ld. Raym. Rep. 1362. — S. C. cited Arg. 2 Ld. Raym. Rep. 1481, 1482. — So where it was to pay to C. S. or order, 9l. 10s. as my quarter's half-pay by advance from such a day to such a day following, was adjudged in C. B. a good bill of exchange; and judgment affirmed in B. R. 2 Ld. Raym. Rep. 1481. Pasch. 13 Geo. Mackleod v. Snee & 4l. — Barnard. Rep. in B. R. 12. S. C. — So where it was to pay out of the 5th payment when it should become due, and promised that it should be allowed, it was adjudged that an action was not maintainable upon this bill, as a bill of exchange. 2 Ld. Raym. Rep. 1563. Mich. 3 Geo. 2. Haydock v. Lynch.

16. *I promise to pay to T. S. 50l. if J. S. doth not pay it within six weeks.* Action was brought on this note, and verdict was for the plaintiff; but judgment was arrested, because the drawer was not the original debtor, but might be a debtor on contingency. Arg. 8 Mod. 363. Pasch. 11 Geo. 1. cites it as the case of Appleby v. Riddolph.

17. There are *no precise words necessary* to be used in a promissory note or bill of exchange. 2 Ld. Raym. Rep. 1397. Trin. 11 Geo. 1. cites Rast. 338. and says that *deliver such a sum of money*, makes a good bill of exchange.

2 Ld. Raym. Rep. 1396. S. C. Powis J. relied much upon the verdict in this case; but Fortescue J. Reynolds J. and Raymond Ch. J. were of opinion, that if the note was not within the act, the verdict could not help it; but the note would be within the act, or not upon the words of the note; and judgment for the plaintiff. [241]

18. The indorsee brought an action against the drawer of a note, by which he *promised to account with T. S. or his order for 50l. value received by him*, &c. per cur. the statute of 3^d & 4th Ann. cap. 9. was made for the ease of trade, and it is a remedial law, for which reason it shall be extended as far as possible; therefore the words in this note, by which the drawer *promises to be accountable to T. S. for 50l. shall be construed as a promise to pay* the money, and the rather, because it is to be accountable to T. S. or his order, but it is impossible for him to account with the indorsee, therefore it must be to pay; besides this must be originally either a debt or a trust, and nothing appears in the note to make it a trust, therefore it must be a debt. As to the objection that * the drawer may be a factor, and might apply this money for the use of the drawee; the words in this note will not make him a factor, (viz.) I promise to be accountable for so much money, &c. For the money must be received to account as well as the promise made to account; therefore the word accountable in this case, shall be taken to pay; and the difference is, when it is to be accountable for so much money, value received, and when it is value received on account, or, to account, or, as by account, as it is usual between merchant and factor, or lord and steward, and it would be dangerous to the credit of those notes, if this should not be good; therefore judgment was given for the plaintiff. 8 Mod. 363, 364. Pasch. 11 Geo. Norris v. Lea.

19. There is no occasion for the words (*value received*) to be in the bill of exchange itself; per cur. obiter. Barnard. Rep. in B. R. 88. Mich. 2 Geo. 2.

20. In case for money had and received to the plaintiff's use, the defendant pleaded non assumpsit, and gave notice to set off the following bill of exchange, directed to J. S. "Sir, at six weeks after date, pay to Benjamin Wheatley, Esq; or order, eight guineas, for your humble servant, John Pierce. London, Aug. 23d, 1736." At the trial it was objected, and agreed to by the court, first, that this was not a bill of exchange within the custom of merchants, nor could be taken advantage of as such, either by way of set-off, or by an action brought upon it; nor would it be any sort of evidence of money lent, there being *no consideration either appearing on the note, or offered to be proved*, and it is nothing more than a bare power or authority to receive so much for the plaintiff's use. Secondly, that if it had amounted to a bill of exchange, yet the laches of the defendant, in not demanding the money, and giving notice in case of non-payment for so long a time, would effectually discharge the plaintiff; and accordingly the plaintiff had a verdict, at the sittings in C. B. at Westminster, before Ld. Ch. J. Willes, after Trin. Term, 1742. Pierce v. Wheatley.

(B) Demandable and payable. When. How.
And of whom.

1. *CONVENIENT* time is according to the usage of trade and circumstances of particular cases; per Holt Ch. J. *Skinh. 410. pl. 6. Hill. 5 W. & M. in B. R.*
1 Salk. 132. pl. 19. Hill & al' v. Lewis.

the S. C. & S. P. by Holt Ch. J.

2. The time of receiving money upon a goldsmith's note is *immediately*, or else it will be at the peril of him who has the note. *He who delivers over the note will not be charged if the goldsmith fail*, as the drawer of a bill of exchange would be; but the receiver is supposed to give credit to the goldsmith, and the note is looked upon as ready money, payable immediately; and if he does not like it, he ought to refuse it, but having accepted it, it is at his own peril. *Ld. Raym. Rep. 744. Trin. 7 W. 3. at Guildhall, Taffell v. Lewis.*

But note, if the party to whom the note is delivered, demands the money of the goldsmith in reasonable time, and he will not pay it, it will charge him

who gave the note. *Ibid. cites Hill. 1 Ann. B. R. at Guildhall, Hopkins v. Geary.*

3. There is *no custom* for the protest of inland bills of exchange, [242] nor any certain time assigned by the custom for the payment of them, therefore *the money ought to be demanded in reasonable time after it is payable*, and then if it is not paid, the drawer will be charged. See the statute 9 W. 3. cap. 17. *Ld. Raym. Rep. 743, 744. Trin. 7 W. 3. Taffell v. Lewis.*

4. A bill was made payable 10 days after sight; Powell and Nevil J. held, that the day ought to be included, so that the day whereon the bill was shewn, shall be reckoned one of the ten. But Treby Ch. J. e contra; but notwithstanding, because his brothers were of a contrary opinion, he awarded that the writ should stand, and that the defendant should answer over. *Ld. Raym. Rep. 280. Mich. 9 W. 3. Bellasis v. Hester.*

S. P. and the Ch. J. held at Guildhall, that the day of sight is to be taken exclusive; for the law will not allow of fractions in

a day. *Barnard. Rep. in B. R. 303. Hill. 2 Geo. 2. Coleman v. Sayce.*

5. A demand of a servant of the drawer, who used to pay money for him, is a demand; per Holt. 12 Mod. 241. *Mich. 10 W. 3. in case of the Governor and Company of the Bank of England v. Newman.*

6. An executor gave a legatee a bill on a goldsmith, but the legatee did not demand the same of the goldsmith, and the goldsmith breaks. It was held by Ld. Keeper, that the loss shall be to the legatee; but if he had demanded it in convenient time, and the goldsmith had not paid it, but had broke, it would be no payment, but legatee might resort back to the executor for his legacy. And it was said in this case, that 4 or 5 days should be a convenient time for this purpose. 2 Freem. Rep. 247. pl. 314. *Hill. 1700. Phillips v. Phillips.*

S. C. cited 2 Freem. Rep. 257. pl. 324. *Trin. 1702. in case of Crawley v. Crowcher,* in which case it was held and admitted, that if a man receives a goldsmith's bill in payment for money, and he that receives the bill never demands it in 3 or 4 days

days time at the most, and afterwards the goldsmith breaks, that this neglect shall occasion the loss to fall upon the receiver; but if the *goldsmith breaks in 3 days time*, the loss shall fall upon him who gave the bill for payment; for although taking a goldsmith's bill is payment *prima facie*, yet it is subject to that contingency, that the bill may be had if it be demanded in 3 days time, and that the Ld. Keeper said was the practice in Guildhall, when he practised there; but in this case *the plaintiff was offered his choice at the goldsmith's shop, to have either his money or a bill*, and he chose a bill, and the next day the goldsmith broke, and therefore the loss fell not upon the party who paid the money, but upon the plaintiff; for it was his own fault that he would not take his money.

7. *Time of demand* of foreign bills is 3 days, and no allowance is to be made for Sundays and holidays. 1 Salk. 128. pl. 9. Pasch. 11 W. 3. at nisi prius, per Holt Ch. J. Lambert v. Pack.

8. *Three days of grace* are allowable by the custom of London, as well where bills are payable at *certain days after sight*, as where it is payable *upon sight*; per the Ch. J. at Guildhall. Barnard. Rep. in B. R. 303. Hill. 2 Geo. 2. Coleman v. Sayer.

9. A question was, whether 3 days of grace in certain are allowable *upon inland bills as well as upon foreign ones, or whether only a reasonable time*? The common serjeant, and the foreman of the jury, said, that the constant practice of the city was, to allow them in one case as well as the other; upon which the Ch. J. said, that then he would not alter it; though he observed, that he remembered two cases, one in Ld. Ch. J. Kelynge's time, the other in Ld. Holt's, where they were both of the opinion, that in inland bills only it is a reasonable time; and what that is the jury ought to determine. Barnard. Rep. in B. R. 303. Hill. 2 Geo. 2. Coleman v. Sayer.

[243] (C) Payable to whom. In respect of the Words.

- Adjudged 10 Mod. 186. Hill. 1 Geo. 1. B. R. v. Ormiston. Carth. 403. S. C. adjudged accordingly.—S. P. by Holt Ch. J. at the sittings in London, 2 Dec. 1696. Comb. 401. Anon.—12 Mod. 309. Mich. 21 W. 3. S. P. per Holt Ch. J. in case of Hart v. King.—S. P. agreed. Comyns's Rep. 76. Trin. 22 W. 3. pl. 49.
1. IF by deed, bill, or other writing, money be to be paid *to B.'s order*, it is due to B. himself, and judgment accordingly. 2 Show. 8. Pasch. 30 Car. 2. B. R. Frederick v. Cotton.
 2. Per cur. a bill of exchange, payable *to a man and his order, or to his order only*, was one and the same. 12 Mod. 125. Pasch. 9 W. 3. Fisher v. Pomfret.

(D) Where there is a Cestui que Use.

- 2 Show. 509. pl. 473. S. C. adjournatur.—
1. BILL by A. payable to B. *to the use of C.*—C. has only an equitable right to the money after it is paid to B. and C. cannot maintain an action against A. for this money, and so B. may

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may indorse and assign the bill to any one, and such indorsee may bring action against the drawer. Carth. 5. Trin. 3 Jac. 2. B. R. Evans v. Cramlington.

Show. 4.
S. C. Pasch.
1 W. & M.
adjudged
accordingly,

per tot. cur.—Skinn. 264. S. C. curia advisare vult.—2 Vent. 296. 307. Cramlington v. Evans, S. C. in cam. scacc. and judgment in B. R. affirmed.

(E) Of Bills payable to Bearer.

1 **A.** By a note under seal, *promised to pay to the bearer thereof*, upon the delivery of the note, 100l. and avers, that it was delivered to A. by the bearer thereof, and that the plaintiff was so. The court said, that the person seems sufficiently described at the time that it is made a deed, which is at its delivery; and by the delivery he expounds the person before meant; as when a merchant promises to pay to the bearer of the note, any one that brings the note shall be paid; but Jones J. said, that it was the custom of merchants that made that good. Adjournatur. 2 Show. 160, 161. Pasch. 33 Car. 2. B. R. Sheldon v. Hentley,

2. Ruled, that where a bill is drawn payable to W. R. or bearer, an assignee must sue in the name of him to whom it was made payable, and not in his own name; for if the bearer was allowed to sue in his own name, then a stranger, who by accident may find the note, if lost, might recover; but if it is made payable to W. R. or order, there an assignee may sue in his own name, because the order must be made by indorsement, or the like, to shew the drawer's consent. 3 Salk. 67. pl. 1. Pasch. 9 W. 3. C. B. Nicholson v. Seldnith.

3. Bellamy gave a bill of exchange payable to N. or bearer; N. went and negotiated with the bank at the usual rate of interest. After this, the bank received 100l. of Bellamy, and after that demanded the * money due on the bill of a servant of B. who did not pay it; and after Bellamy failed, and the bank brought an assumpsit against N. for the money, and on general issue a verdict for the plaintiff, and a new trial granted, the verdict being against law; for whatsoever may be the practice among the bankers, the law is, that if a bill or note be payable to one or bearer, and he negotiates the bill, and delivers it for ready money paid to him, without any indorsement on the bill, this is a plain buying of the bill, as of tallies, bank-bills, &c. but if it be indorsed, there is a remedy against the indorser. But Holt laid the rule thus: if a man gives such a bill for money not due before without indorsement, it is a sale of the bill. 12 Mod. 241. Mich. 10 W. 3. The Governor and Company of the Bank of England v. Newman.

* [244]

Comyns's
Rep. 57.
Pasch. 11
W. 3. S. C.
and a new
trial granted,
because the
bank having dis-
counted the
bill with
allowance,
it was a pur-
chase in
them of the
bill; besides
the bill was
not received
at the day
when the
bill was
good, and

B. solvent, which delay was laches in the bank.—Ld. Raym. Rep. 442, Trin. 11 W. 3. S. C. & S. P. held accordingly by Holt Ch. J. and that a new trial was granted; but upon a new trial the jury found for the plaintiffs.

4. If a bill be payable to A. or bearer, it is like so much money paid to whomsoever the bill is given, that let what accounts or conditions soever be between the party who gives the note and A. to whom it is given, yet it shall never affect the bearer, but he shall have his whole money. 2 Freem. Rep. 258, pl. 324, Trip. 1702, in case of *Crawley v. Crowther*.

(F) Where the Words are Imperfect.

1. IF I owe to A. B. 20l. to be paid in watches, the action must be brought for the money, and not for the watches. And, 117. pl. 145, Hill, 26 Eliz. Anon.
2. Memorandum that I have received of E. T. to the use of my master J. S. the sum of 40l. to be paid at Michaelmas following. The bill was sealed, and, being general, charges the servant, and no remedy upon it against the master. Adjudged, Yelv. 137, Mich. 6 Jac. B. R. *Talbot v. Godbolt*,
Brownl. 103. S. C. but is only a translation of Yelv. — Yelv. 147. S. C. accordingly per tot. cur. and this upon conference with all the justices in Fleet-street.

3. But if the bill had recited the repayment to have been to be made by his master, then, per omnes, the bill would only be a receipt, and merely to another's use; per tot. cur. and this upon conference with all the justices in Fleet-street. Yelv. 147, Mich. 6 Jac. B. R. *Talbot v. Godbolt*.

4. I promise to account with T. S. or his order, for 50l. value received, per me, &c. Action lies on this note for indorsee against the drawer; on the 3 & 4 Ann. 9, 8 Mod. 362, Pasch. 11 Geo. 1, *Morice v. Lee*,

(G) Drawer. Chargeable in what Cases.

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1. IF the indorsement be void, yet he that drew the bill shall be liable to him to whose use it was first made; per cur. 2 Keb. 303. Mich. 19 Car. 2. B. R. in case of *Dashwood v. Lee*.

2. If the drawer mentions it for value received, then he is chargeable at common law; but if no such mention, then you must come upon the custom of merchants only; per Holt Ch. J. Show, 5. Pasch. 1 W. & M. in case of *Cramlington v. Evans*.

3. Bill of exchange was indorsed, yet, if it be not paid, the drawer is liable, and that though he be a gentleman, and no merchant. Cumb. 152. Mich. 1 W. & M. at Serjeant's-inn. *Sarfield v. Witherly*.

4. Pay to A. or his order, 40l. and place it to my account, value received. The money was not demanded till the action (which was an *indebit assumpsit*) was brought against the drawer,

Carth. 82. S. C. — Vent. 292. S. C. — Show. 125. S. C.

drawer, and which was 2 years after the bill given. Hoſt Ch. J. upon conſideration, held that ſuch a note ſhould be deemed payment, and that the plaintiff was ſatisfied with the merchant as his debtor, if he did not *within convenient time* reſort back to the drawer; and keeping the bill ſo long was an evidence that he thought the merchant good at that time, and that he agreed to take him as his debtor. Show. 155. Paſch. 2 W. & M. Darrach v. Savage.

5. If the indorſee of a bill accepts but *2d. from the acceptor*, he can never after reſort to the drawer. Ld. Raym. Rep. 744. Trin. 7 W. 3. Taſſel v. Lewis.

6. A. gave to B. a bill of exchange for value received. B. assigns it to C. for an honeſt debt. C. brings an *indebitatus aſſumpſit* on this againſt A. and had judgment; on which A. brings his bill to be relieved in equity againſt this judgment, *becauſe there was really no value received at the giving this bill, and C. would have no prejudice, who might ſtill reſort to B. upon his original debt.* It was answered, that A. might be relieved againſt B. or any claiming as ſervant or factor of or to the uſe of B. But the chancellor held, that C. being an honeſt creditor, and coming by this bill fairly, for the ſatisfaction of a juſt debt, he would not relieve againſt him, becauſe it would tend to deſtroy trade, which is carried on every where by bills of exchange, and he would not leſſen an honeſt creditor's ſecurity. Comyns's Rep. 43. pl. 28. Mich. 9 W. 3. Anon.

7. If the party, to whole hands a bill of exchange comes, *neglects to receive the money from the acceptor*, there he ſhall not reſort to the firſt drawer, becauſe he hath relied on the acceptor, the firſt drawer being *only chargeable by cuſtom or contract in law.* 12 Mod. 203. Trin. 10 W. & M. at Guildhall. Clerk v. Mundall.

8. A. drew a bill on B. payable to C. in 3 days. B. broke. C. kept the bill 4 years, and then brought aſſumpſit againſt A. Treby Ch. J. held, that when one draws a bill of exchange, he ſubjects himſelf to the payment, if the drawee reſuſes either to accept or pay; but then if the bill is not paid in convenient time, the perſon to whom it is payable ſhall give the drawer notice thereof; for otherwiſe the law will imply that the bill was paid, becauſe there is a truſt between the parties, and it may be injurious to commerce if a bill may riſe up to charge the drawer at any diſtance of time, when in the mean time all accompts may have been adjusted between them. 1 Salk. 127. pl. 7. Mich. 10 W. 3. at Guildhall. Allen v. Dockwray.

9. In foreign bills of exchange the proteſt makes the drawer liable, and notice ſhould be given of the proteſt to the drawer in convenient time. 12 Mod. 309. Mich. 3 W. 3. Hart v. King. [246]

10. It was agreed, that an acceptance or negotiation in England, after a bill becomes payable, ſhall bind the acceptor or indorſor, though not perhaps the original drawer. 12 Mod. 410. Trin. 12 W. 3. in caſe of Mitford v. Walcot.

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11. *A. draws a bill of exchange in payment, and the party does not call for the money from the drawee in convenient time, and he fails, he shall then come upon the drawer.* 12 Mod. 509. Pasch.

13. W. 3. coram Holt Ch. J. at Guildhall. Anon.

12. The defendant being a captain of a ship, took several goods for the use of the ship from the plaintiff, who sent his servant with a bill to him for the money. The defendant orders the servant to write him a receipt for the money, which he did, and thereupon he gives him *a note upon a 3d person, payable in 2 months.* The master sent several times to the 3d person to present him the note, but *could not get sight of him within the time at which the money was payable.* The party breaks, and now this action is brought for the money against the captain. All this appearing on evidence, and that the captain went to sea next day after he gave the note, Trevor Ch. J. directed for the plaintiff. 6 Mod. 147. Pasch. 3 Ann. B. R. Popley v. Ashley.

13. And per ipsum, if a man gives *a note upon a 3d person in payment, and the other takes it absolutely as payment, yet if the other knew the 3d person breaking, or to be in a failing condition, and the receiver of the note uses all reasonable diligence to get payment, but cannot, that is a fraud,* and therefore no payment, and here was no laches in the plaintiff; for the party failed before the money was payable, and the captain was gone to sea, so he could not come back to him to give him notice. 6 Mod. 147. Pasch. 3 Ann. B. R. Popley v. Ashley.

14. *But if a man takes a note, and after it is payable makes no demand, and that he might be paid if he had been diligent enough, there if the party, on whom the note is, fails, it is at his peril that took the note.* 6 Mod. 147, 148. Pasch. 3 Ann. B. R. Popley v. Ashley.

15. If a bill of exchange be not paid by the indorfor, the drawee must give *notice of non-payment to the drawer* before he brings an action against him. 8 Mod. 43. Pasch. 7 Geo. 1. Lawrence v. Jacob.

(H) Indorfor. In what Cases liable. What Indorsee must do and prove.

1. *A. Drew a bill of exchange upon B. payable to C. Then B. accepts the bill. C. indorsets it to D. Now by this indorsement by C. to D. B. is discharged of any payment as to C. and if D. indorsets it over to E. then B. is discharged of any payment to D. But if D. pays the money to E. then D. by this payment becomes again intitled to receive the money of B. and at such time no other, whether E. or C. is intitled to bring any action against B. but D. only. So if C. pays the money to D. then B. is discharged as to D. but C. becomes newly intitled, and B. is again liable as to him, but discharged against D. and E. See Lutw. 885. b. 888. b. 1 Jac. 2. in cam. scacc. Death v. Serwonters.*

2. Recovery

2. *Recovery by indorsee against the drawer, without satisfaction*, 3 Mod. 86. was adjudged in B. R. to be a bar to an action brought by him against a *mean indorser*; but this judgment was afterwards reversed in the exchequer-chamber. Cumb. 4. Mich. 1 Jac. 2. and *ibid.* 32. Mich. 2 Jac. 2. Claxton v. Swift.

J. e contra. — 2 Show. 441. pl. 404. S. C. adjournatur. — *Ibid.* 494. pl. 462. S. C. adjudged by 3 judges for the defendant, but reversed afterwards in Cam. Scacc. — Skin. 255. pl. 3. Mich. 2 Jac. 2. B. R. the S. C. and the plea ruled good by 3 justices. — But Lutw. 878. 882. b. S. C. says the judgment was now reversed, because there was not any satisfaction; for the court were of opinion, that this case differs from the case of 2 trespassors, and is rather to be resembled to 2 debtors by a joint and several obligation, because by the custom the first drawer of the bill, and every indorser thereof, is liable to the payment of a sum certain to the last indorser, though the action be to recover by way of damages.

3. Ruled that where a bill is drawn payable to *W. R. or order*, and he indorses it to *B. who indorses it to C.* and he indorses it to *D.* the last indorsee may bring an action against any of the indorsors, because every indorsement is a new bill, and implies a warranty by the indorser that the money shall be paid. 3 Salk. 68. pl. 3. 5 W. 3. B. R. Williams v. Field.

4. *M.* a goldsmith drew 2 bills on *J. S.* payable to *L.* the defendant, who on the 10th of October indorsed them to *H. the plaintiff.* *J. S.* accepted the bills, and paid by the order, and on account of *L.* 800l. in money, and gave another bill for the residue. Afterwards, the same day, *H. the plaintiff, being also a goldsmith, received money of M. upon other bills, and might have received the money on this bill, but did not, for H. did not demand it, and the night following M. broke.* The question was, whether *L.* the defendant, who was the indorser, is liable? Holt Ch. J. held, that by the acceptance of this bill by the plaintiff, the indorser was not discharged; for while the bill is in agitation, every indorser is as much liable as the first drawer, and cannot be discharged by the acceptance of the bill, without actually paying of the money; but by custom the indorser is only liable in default of the first drawer, but if there is any neglect in the indorsee to receive it in convenient time, and if within that time the drawer becomes insolvent, then the indorser is discharged. 1 Salk. 132. pl. 19. Hill v. Lewis.

three days were allowed.

5. Though a bill be *without the words (or to his order)*, yet the indorsement of such bill is good, or of the same effect between the indorser and indorsee, to make the indorser chargeable to the indorsee; per Holt Ch. J. 1 Salk. 133. in case of Hill v. Lewis.

indorsed, the indorser shall be charged; for every indorsement is as a new bill; per Holt Ch. J. Skin. 411. pl. 6. Hill. 5 W. & M. in B. R. the S. C.

Though a bill, payable to *J. S. or bearer*, be not indorseable, yet if it be in-

6. *Blank indorsement* does not actually transfer the property without some further act; per Holt Ch. J. 1 Salk. 126. pl. 4. Pasch. 10 W. 3. B. R. Clark v. Pigot.

12 Mod. 192. S. C. at Guildhall. — 1 Salk. 130. pl. 15. Pasch. 2 Ann. B. R. Lucas v. Haines, S. P.

7. *Indorsee*

Because by this means the defendant would be subject to

7. *Indorsee of part of the sum in a bill of exchange cannot bring action, without shewing the other part to be satisfied.* 1 Salk. 65. pl. 2. Mich. 10 W. 3. B. R. Hawkins v. Cardee.

as many actions as the person, to whom the note was given, should think fit, and that upon single contract. Carth. 466. S. C. — 12 Mod. 213. Hawkins v. Gardiner, S. C. & S. P. — Ld. Raym. Rep. 360. S. C. adjudged per tot. cur.

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12 Mod.
244. Lam-
bert v.
Oakes,
Mich. 10
W. 3. S. P.
and seems to
be S. C. —

8. If a man *indorses his name on the back of a bill blank*, he puts it in the power of the indorsee to make what use of it he will; and he may use it as an *acquittance* to discharge the bill, or as an *assignment* to charge the indorser. 1 Salk. 127. pl. 9. Pasch. 11 W. 3. at nisi prius, per Holt Ch. J. Lambert v. Pack.

Ld. Raym. Rep. 443. Pasch. 11 W. 3. S. C. & S. P. accordingly.

• The in-
dorsement,
though upon
discount,
will subject
the indorser
to an action,
because it is
a conditional

9. In cases of bills *purchased at a discount*, this is the difference; if it be a bill payable to *A. or bearer*, it is an absolute purchase; but if to *A. * or order*, and it is *indorsed blank*, and filled up with an assignment, the indorser must *warrant* it as much as if there had been no discount. 1 Salk. 127. Pasch. 11 W. 3. per Holt Ch. J. Lambert v. Pack.

warranty of the bill, and makes a new contract in case the person, on whom it was drawn, does not pay. 12 Mod. 244. Lambert v. Oakes. — Ld. Raym. Rep. 443, 444. S. C. & S. P. accordingly by Holt Ch. J.

10. It was agreed, that an *acceptance* or negotiation in England *after a bill becomes payable*, shall bind the acceptor or indorser, though not perhaps the original drawer; and for this was quoted Pigot and Jackson's case in B. R. Hill. 9 W. 3. 12 Mod. 410. Trin. 12 W. 3. in case of Mitford v. Walcott.

1 Salk. 236.
pl. 14. S. C.
but S. P.
does not ap-
pear. —
3 Salk. 400.
S. C. but
S. P. does not appear.

11. If a man writes on the back of a bill of exchange, *this is to be paid to J. S. or, the contents* of this bill is to be paid to J. S. and sets his hand to it, it will be a good *indorsement*; per Holt Ch. J. 7 Mod. 87. Mich. 1 Ann. B. R. in case of East v. Eslington.

12. *A. draws a bill upon B. who had effects enough in his hands to answer the bill, which some time after is protested*, whereupon the bill is *indorsed to A. the drawer, who brings an action as indorsee*; per Parker Ch. J. at nisi prius, there being effects, the acceptance was not upon the honour of the drawer, and so the action is well brought; for when a merchant draws a bill on his correspondent, who accepts it, this is payment; for it makes him debtor to another person, who may bring his action; so this is a payment, as may be set off upon a former account, and pleaded in bar of such action: but if there were *no effects*, the action would not lie, for it would have been an acceptance upon honour only, and the money would be recovered only to be recovered again. 10 Mod. 36. Trin. 10 Ann. B. R. Louviere v. Laubray.

13. If a note be *payable to a feme sole, or order, and she afterwards marries*, her husband is the proper person to indorse this note; per Parker Ch. J. 10 Mod. 246. Trin. 13 Ann. B. R.

14. A.

14. A. gave a promissory note, payable to B. or order. B. assigns it to C. and C. assigns it to D. without saying to him, or order. Resolved per tot. cur. that this is good; for if the original bill was assignable, (as it will be if payable to one, or his order,) then to whomsoever it is assigned, he has all the interest in the bill, and may assign it as he pleases: for the assignment to C. is an absolute assignment to him, which comprehends his assigns, and therefore nothing is done when the bill is assigned but indorsing the name of the indorser, upon which the indorsee may write what he will, and at a trial when the bill is given in evidence, the party may fill up the blanks as he pleases. Comyns's Rep. 311. pl. 160. Mich. 5 Geo. 1. C. B. Moor v. Manning.

The question was, whether such indorsement by C. to D. will amount to a new bill to charge the indorser? Dubitatur & adjournatur. Comb. 176. Mich. 3 W. & M. in B. R. Duckman-
nee v. Keekwith.

15. A goldsmith's note was given in part of payment of money on a Saturday, but was not offered to the drawer till Monday morning after, when the indorsee sent the note by his servant to the drawer, without any order to stay, but only to demand the money; and the servant accordingly offered the note to the cashier of the drawer, who cancelled it, and desired the servant to call again in half an hour, for that the drawer was gone to the bank to receive money. The servant went away, and returned within the time, and afterwards called twice more, and then went to his master, and told him the goldsmith could not pay it; whereupon the master went himself, and finding the note cancelled, so that he had no remedy, he procured a new note of the same date with the original note, and for the same sum. This is no new credit given to the drawer, but that the indorser is still liable. 9 Mod. 60. Mich. 10 Geo. 1. Mead v. Caswell.

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16. 9 & 10 W. 3. cap. 17, puts inland bills of exchange upon the same footing with foreign bills, where the money is recoverable by the custom among merchants upon signing such bills, and the statute 3 & 4 Anna, cap. 9, puts promissory notes on the same footing with inland bills, and enacts, that the assignee or indorsee may maintain an action against the drawer or indorser, and recover damages, &c. and therefore it was insisted, that an action of debt will not lie, because damages are never recovered in debt; but per cur. if plaintiff had declared on an *indebitatus assumpsit*, he might have recovered in damages. 8 Mod. 373. Trin. 11 Geo. 1. Welsh v. Creagh.

17. Action was brought against the indorser of a promissory note, and the plaintiff had judgment. 8 Mod. 307. Mich. 11 Geo. 1. Elliot v. Cowper.

(I) Acceptance. What is a good Acceptance,

1. [F a bill of exchange be tendered, and the party subscribes accepted, or, accepted by me A. B. or, being in the exchange, says, I accept the bill, and will pay it according to the contents, this amounts,

amounts, without all controversy, to an acceptance. Molloy, lib. 2. cap. 10. f. 16.

2. A small matter amounts to an acceptance, so that there be a right understanding between both parties; as, *leave your bill with me, and I will accept it*; or, *call for it to-morrow, and it shall be accepted*, that does oblige as effectually by custom of merchants, and according to law, as if the party had actually subscribed or signed it (which is usually done). Molloy, lib. 2. cap. 10. f. 20.

3. But if a man shall say, *leave your bill with me, I will look over my accounts and books between the drawer and me, and call to-morrow, and accordingly the bill shall be accepted*, this shall not amount to a compleat acceptance; for this mention of his books and accounts, was really intended to see if there were effects in his hands to answer, without which, perhaps, he would not accept of the same; and so it was ruled by Ld. Ch. J. Hale at Guildhall. Molloy, lib. 2. cap. 10. f. 20.

* 2 Show.
8. pl. 5.
Paich. 30
Car. 2.
B. R. Frederick v.
Cotton, S. P.
resolved.

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Ld. Raym.
Rep. 175.
S. C. &
S. P. admitted, and
judgment
for the plaintiff.

4. Where a bill of exchange is payable * *to A.'s order*, that is to himself if he makes no order, and if the party *underwrites* the bill, viz. presented such a day, or *only the day of the month*, it is such an acknowledgment of the bill as amounts to an acceptance: per Holt Ch. J. and this by the jurors was declared to be common practice. Cumb. 401. per Holt Ch. J. at the fittings in London, 2 Dec. 1696. Anon.

5. Acceptance of bill upon two *by one partner*, binds both if it concerns the joint trade; but otherwise if it concerns the acceptor only in a distinct interest and respect. 1 Salk. 126. pl. 3. Hill. 8 W. 3. B. R. Pinkney v. Hall.

for the plaintiff. — S. P. by Holt Ch. J. 12 Mod. 345. Mich. 11 W. 3. Anon.

6. Bill drawn by A. on B. and B. accepts it by indorsement, thus, (*I do accept this bill, to be paid half in money, and half in bills*). It was alleged, that B.'s writing on the bill was sufficient to charge him with the whole sum; but it was proved by divers merchants, that the custom among them was quite otherwise, and that there might be a *qualification* of an acceptance; for he that may refuse the bill totally, may refuse it in part; but he to whom the bill is due, may refuse such acceptance, and protest it so as to charge the first drawer, and though there be an acceptance, yet after that he has the same liberty of charging the first drawer as before he had. Cumb. 452. Trin. 9 W. 3. B. R. Petit v. Benson.

12 Mod.
410. Trin.
12 W. 3.
S. C. adjudged for
the plaintiff.

7. Acceptance after the time of payment elapsed, and a promise then to pay the money *secundum tenorem billæ præd'* is good, and amounts to a promise to pay the money generally. 1 Salk. 129. pl. 11. 12 W. 3. B. R. Mitford v. Wallicot.

— Ld. Raym. Rep. 574. S. C. adjudged. — It amounts to a promise to pay the money presently. 12 Mod. 212. Mich. 10 W. 3. Jackson v. Pigot. — Carth. 459. S. C. and as for the words, *secundum tenorem & effectum billæ*, the effect of the bill is the payment of the money, and not the day of payment; or, at the most, it is only surplusage in the declaration; and judgment for the plaintiff. — Ld. Raym. Rep. 365. S. C. adjudged for the plaintiff.

8. If bill be drawn on one at Amsterdam, and he *does not care to accept it, but gets one here to do it*, the party need not acquiesce; but if he does, the party here is bound; per cur. 12 Mod. 411. Trin. 12 W. 3. in case of Mitford v. Walcot.

9. A bill of exchange was directed to A. or in his absence to B. and begun thus, viz. Gentlemen, pray pay. The bill was tendered to A. who promised to pay it as soon as he should sell such goods. In action for non-payment, it was objected that this was a *conditional acceptance*; but here the *action being by an executor*, and upon debt laid to be due to testator, Holt Ch. J. held it necessary to *prove that the acceptance was in the testator's life-time*. 12 Mod. 447. Pasch. 13 W. 3. Anon.

10. Bill of exchange may be *accepted by parol*, but not transferred otherwise than by writing on the back, and that transfers the property by the custom of merchants. 7 Mod. 87. Mich. 1 Ann. B. R. East v. Effington.

1 Salk. 130.
pl. 14. S. C.
& S. P.
mentioned,
and seems
admitted. —

3 Salk. 400. S. C. but S. P. does not appear. — S. P. by Holt Ch. J. as to the acceptance.
12 Mod. 345. Mich. 11 W. 3. Anon.

11. A foreign bill was drawn on the defendant, and being returned for want of acceptance, the defendant said, that *if the bill came back again he would pay it*; this was ruled a good acceptance. 3 New Abr. 610. cites Mich. 6 Geo. 1. B. R. Car v. Coleman.

12. The drawee wrote a letter to him in whose favour the bill was drawn, that *if he would let him write to Ireland first he would pay him*; and this was held a good acceptance. 3 New Abr. 610. cites Mich. 12 Geo. 1. coram Raym. Ch. J. at nisi prius. Wilkinson v. Lutwich.

(K) Acceptor. Liable in what Cases.

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1. **A**CCCEPTOR of a bill drawn for a sum won at gaming more than the statute allows, may plead the statute against gaming against the person himself, but not perhaps against any indorsee for value received. Carth. 356. Trin. 7 W. 3. B. R. Hufsey v. Jacob.

5 Mod. 175.
S. C. ad-
judged for
the defend-
ant. —

held accordingly. — 12 Mod. 96. S. C. adjudged accordingly.

2. It was agreed, that an *acceptance* or negotiation in England *after bill becomes payable*, shall bind the acceptor or indorsee, though not perhaps the original drawer. And for this was quoted Pigot and Jackson's case in B. R. Hill. 9 W. 3. though it were an acceptance to pay *juxta tenorem bill' præd'* as here; Arg. 12 Mod. 410. Trin. 12 W. 3. Mitford v. Walcot.

1 Salk. 344.
pl. 2. S. C.

(L) Where the Acceptance is for the Honour of the Drawer or Indorfor.

1. **I**N case upon a bill of exchange, the plaintiff *set forth a custom inter mercatores & alias personas*, that if a bill is indorsed and accepted by a person upon whom it is drawn, if any other merchant will pay the money to the indorsee, for the honour of the indorfor, then the first drawer is chargeable to him; that F. the defendant drew a bill upon J. S. for 100l. payable to J. D. that J. S. accepted the said bill, and J. D. indorsed it to M. L. and that R. the plaintiff paid the money to the said M. L. for the honour of the said J. D. the indorfor, and that thereupon F. the drawer became liable to him, but had not paid the money, ad damnum, &c. The plaintiff had judgment by nil dicit, &c. but it was reversed upon a writ of error in the exchequer chamber, because the *custom was laid too general*; for it extended not only to merchants, but to all other persons whatsoever. Lutw. 891. a. 892. b. Mich. 2 Jac. 2. in Cam. Scacc. Fairly v. Roch.

Lutw. 896. a. 899. a. Lewin v. Brunetti, in the exchequer chamber, S. C. and after several arguments, judgment was affirmed, Pollexfen Ch. J. Medstante.

2. R. drew a bill of exchange on S. payable to B. S. refused to accept it, whereupon B. protested it. L. for the honour of R. gave a note to pay the money at the day, if not paid by R. Afterwards B. indorsed L.'s note to C. for value received; C. in like manner indorsed it to D. and he to E. and he to F. all for value received. At the day of the return S. still refused to accept the bills, whereupon L.'s bill was protested. Then M. & N. hearing of the protest of L.'s bill, pay the money for the honour of B. But in action by M. & N. against L. the declaration does not say that they paid it to F. nor to whom they paid it, but only generally that they paid it. This matter was assigned for error, and that for what appears it might be paid not to F. the last indorsee, to whom alone it was due, but to another, and if so, the defendant remains still liable as to him. But per cur. after verdict, it shall be intended that the payment was to the right person, especially it being laid to be ex parte of the plaintiff, which could not be if it had been paid to a stranger; and so judgment in B. R. was affirmed in Cam. Scacc. Carth. 129. Paich. 2 W. & M. Brunetti v. Lewen.

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3. If A. draws a bill on B. who will not accept it, and C. offers to accept it for the honour of the drawer, the drawee need not acquiesce, but may protest; but if he *does acquiesce*, C. is bound; per cur. 12 Mod. 410. Trin. 12 W. 3. Mitford v. Walcot.

(M) Time of Demand and Protesting.

1. **A** Draws a bill upon B. to the use of C. Upon non-payment C. protests the bill. He cannot sue A. unless he gives him notice that the bill is protested, for A. may have the effects

effects of B. in his hands, by which he may satisfy himself. Vent. 45. Mich. 21 Car. 2. B. R. Anon.

2. After verdict it was moved for a new trial, that the *protest was not on the day the money became due*; but Twisden J. said it had been ruled, that if a bill of exchange be denied to be paid, the protest *must be in a reasonable time, and that is within a fortnight*; but that the debt is not lost by not doing it by the day; and a new trial was denied. Mod. 27. pl. 72. Mich. 21 Car. 2. B. R. Butler v. Fry.

3. *Time of protesting bills of exchange to make the drawer liable, is * at the end of 2 months.* Camb. 152. Mich. 1 W. & M. in B. R. Sarfield v. Witherly.

If a bill be accepted, the protest must be at the day of payment.

ment. If at sight, then at the 3d day of grace, and a bill negotiated after day of payment, is as a bill at sight; agreed by merchants. Show. 164. Trin. 2 W. & M. in case of Dehers v. Harriott.

* This was said by merchants to be the custom of France, and that in Holland it must be in 60 many posts. Show. 165.

4. A bill of exchange is made payable to A. A. indorses it to B. B. indorses it to C. the bill is *protested for non-payment*; B. may bring an *action* on this bill, notwithstanding his indorsement. Show. 163. Trin. 2 W. & M. Dehers v. Harriott.

5. Some merchants said, that if a bill be negotiated by indorsement after the bill is payable, there is *no need of a protest at all*. Others, that a protest must be in some convenient time. Show. 164. Trin. 2 W. & M. in case of Dehers v. Harriott.

6. All the merchants agreed, that if a bill is lost, and the drawer might be resorted to for a new bill, then no protest could be upon a copy; but where a bill is lost, and no new one can be had, and the party did not insist to have the original bill, but refused payment for another reason, there such protest made upon a copy for non-payment is good. Show. 164. Trin. 2 W. & M. in case of Dehers v. Harriott.

7. If there be no accident happening or intervening by the party's breaking, &c. the drawer is chargeable, though the presenting and protest of the bill were after the day; for by the law of merchants it need not be tendered within the time; per Eyre J. and not denied, and judgment pro quer. Show. 318. Mich. 3 W. & M. Mogadara v. Holt.

12 Mod. 15. Meggadow v. Holt, S. C. adjudged for the plaintiff. — But per Holt Ch. J. if he do not tender and

protest at the day, and there be a break in the mean time, the party loses his money; *secus* if no particular damage. Show. 339. Mogadara v. Holt.

8. Indorsee of foreign bills need not demand payment till the three days allowed are expired, and after the 3 days the indorsee may protest it; and it seems the same time of 3 days ought to be allowed for inland bills; per Holt Ch. J. 1 Salk. 132. Hill & al v. Lewis.

Skin. 410, 411. pl. 6. Hill. 5 W. & M. in B. R. the S. C. & S. P. by

Holt Ch. J. but for a goldsmith's bill he said he did not know any definite time.

9. The custom of merchants is, that if B. upon whom a bill of exchange is drawn, absconds before the day of payment, the man to whom it is payable may protest it, to have better security for the

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the payment; and to give notice to the drawer of the absconding of B. and after the time of payment is incurred, then it ought to be protested for non-payment the same day of payment, or after it; but no protest for non-payment can be before the day that it is payable. Proved by merchants at Guildhall, Trin. 6 W. & M. before Treby Ch. J. and the plaintiff was nonsuited, because he had declared upon a custom to protest for non-payment before the day of payment. Ex relatione M^ri Place. Ld. Raym. Rep. 743. Anon.

10. In case of *foreign bills of exchange* the custom is, that 3 days are allowed for payment of them; and if they are not paid upon the last of the said days, the party ought immediately to protest the bill, and return it, and by this means the drawer will be charged; but if he does not protest it the last of the 3 days, which are called the days of grace, there, although he upon whom the bill is drawn fails, the drawer will not be chargeable; for it shall be reckoned his folly that he did not protest, &c. but if it happens that the last day of the said 3 days is a Sunday or great holiday, as Christmas-day, &c. upon which no money used to be paid, there the party ought to demand the money upon the 2d day; and if it is not paid, he ought to protest the bill the said 2d day, otherwise it will be at his own peril; for the drawer will not be chargeable. Merchants in evidence at a trial at Guildhall, Trin. 7 W. 3. before Holt Ch. J. swore the custom of merchants to be such, which was approved by Holt Ch. J. Ld. Raym. Rep. 743. Taffall & Lee v. Lewis.

11. If a foreign bill be drawn on an English merchant, payable at so many days sight, though the days incur without any notice given to the party on whom it is drawn, yet that bill, according to the custom of merchants, may be protested, and thereby recourse had to the first drawer for the money, which Holt Ch. J. thought unreasonable, because the drawer ought not to lie at the mercy of him that has the bill, &c. Cumb. 451. Trin. 9 W. 3. B. R. Anon.

12. If a bill be drawn for like value received, and this is protested, an *indebitatus assumpsit* lies against the drawer; per Shower. Cumb. 451. Trin. 9 W. 3. B. R. Anon.

13. 9 & 10 W. 3. cap. 17. s. 1. *All inland bills of exchange of 5l. or upwards, in which the value shall be expressed to be received, drawn payable at a certain number of days, &c. after the date thereof, may after acceptance (which shall be by underwriting under the party's hand); and the expiration of 3 days after the same shall be due, be protested by a notary public, or, in default of such notary public, by any other substantial person of the place before 2 witnesses, refusal or neglect being first made of the payment.*

14. S. 2. *Which protest shall be notified within 14 days after to the party from whom the bills were received, who (upon producing such protest) is to repay the said bills with interest and charges from the protesting; for which protest there shall not be paid above 6d. and in default of such protest, or due notice within the day limited, the person so failing shall be liable to all costs, damages, and interest.*

15. A bill of exchange was protested, and *lost*, and action brought against the drawer; and it was proved, that *the defendant had owned he had drawn the bill*, and held good by Holt; and he said, that this being an *outlandish bill*, the drawer was made liable by the protest; but *no protest necessary in case of an inland bill*; and that to make a bill payable to one's order, was the same as if it were to him or order; and he said, that if defendant could make it appear that he was at any damage for *want of notice of the protest*, as if drawee had failed in the mean time, &c. it would be incumbent upon the *plaintiff to prove notice given of the protest in convenient time*. 12 Mod. 309. Mich. 11 W. 3. Hart v. King.

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16. If a bill be *accepted at Amsterdam*, and *no house named where* the payment is to be, the party need not acquiesce to it, but may protest the bill; but if he will acquiesce, it is well enough; per Cur. 12 Mod. 410. Trin. 12 W. 3. in case of Mitford v. Walcot.

1 Salk. 129.
pl. 11. S.C.
but S. P.
does not
appear.

17. All the *difference between foreign and inland bills* is, that foreign bills must be protested before a public notary, before the drawer may be charged; but inland bills need no protest; per Holt Ch. J. 6 Mod. 29. Mich. 2 Ann. B. R. in case of Buller v. Crips.

6 Mod. 80.
S. P. but
now by the
stat. 9 & 10
W. 3. 17.
a protest is
directed in

case of inland bills; but that is *only for the benefit of the drawer, to give formal notice that the bill is not accepted, or accepted and not paid*; and the damages in the said statute are only meant of damages by being longer kept out of his money by non-payment of drawee than the tenor of the bill purported, and not of damages for the original debt. Mich. 2 Ann. B. R. Brough v. Perkins.——3 Salk. 69. pl. 6. S. C.

In inland as well as foreign bills of exchange, the person to whom it is payable must give convenient notice of non-payment to the drawer; for if by his delay the drawer receives prejudice, the plaintiff shall not recover. A protest on foreign bills was part of its constitution. On inland bills a protest is necessary by 9 & 10 W. 3. 17. but was not at common law; but the statute does not take away the plaintiff's action for want of a protest, nor does it make such want a bar to the plaintiff's action; but this statute seems only, in case there be no protest, to deprive the plaintiff of damages or interest, and to give the drawer a remedy against him for damages if he makes no protest. 1 Salk. 131. pl. 17. Mich. 2 Ann. B. R. Borough v. Perkins.——3 Salk. 69. pl. 6. S. C. held by Holt Ch. J. and Powell J. accordingly, and that since that statute a protest was never set forth in the declaration.——6 Mod. 80. S. C. and Holt said that the act is very obscurely and doubtfully penned, and that they ought not, by construction upon such an act, to take away a man's right; to which the whole court agreed.——2 Ld. Raym. Rep. 992. Brough v. Parkings, S. C. according to 3 Salk. 69. supra and judgment in C. B. affirmed.

18. 3 & 4 Ann. cap. 9. s. 4. *In case the party on whom an inland bill of exchange shall be drawn, shall refuse to accept the same by underwriting the same, the party to whom payable shall cause such bill to be protested for non-acceptance, as in case of foreign bills, for which protest shall be paid 2s. and no more.*

19. S. 6. *No such protest shall be necessary for non-payment, unless the value be expressed in such a bill to be received, and unless the bill be drawn for 20l. or upwards, and the protest shall be made for non-acceptance by persons appointed.*

20. S. 7. *If any person accept such bill of exchange in satisfaction of any former debt, the same shall be esteemed a full payment, if he doth not his endeavour to get the same accepted and paid, and make his protest for non-acceptance or non-payment.*



(N) Actions. What Actions lie.

S. C. cited by Rainsford J. as Milton's case, lately adjudged in Scacc. and says, that though Hale Ch. B. said it were well if the law were otherwise, yet we all agreed that a bill of exchange

1. **A**N action of debt will not lie upon a bill of exchange accepted, against the acceptor; but a *special action of the case* must be brought against him; because the acceptance does not create a duty no more than a promise by a stranger to pay, &c. if the creditor will forbear his debt; and he that drew the bill continues debtor, notwithstanding the acceptance, which makes the acceptor liable to pay it, and the custom does not extend so far as to create a debt, but only makes the acceptor *onerabilis* to pay the money; wherefore, and because no precedent could be produced, that an action of debt had been brought upon an accepted bill of exchange, judgment was arrested. Hard. 485. 487. Hill. 20 & 21 Car. 2. in the exchequer, Anon. [but seems to be Milton's case.]

accepted, &c. was indeed a good ground for a special action upon the case, but that it did not make a debt; first, because the acceptance is only conditional on both sides. If the money be not received, it returns back upon the drawer, and he remains liable still, and this only collateral. 2dly, Because *onerabilis* does not imply debt. 3dly, Because the case is *primæ impressionis*, and there is no precedent for it. Mod. 286. pl. 3. Trin. 29 Car. 2. B. R. in case of Brown v. London.

In case the plaintiff declared upon the custom of merchants, and that T. S. drew a bill of exchange upon the defendant to pay to the plaintiff, which he accepted, and has not paid, and likewise upon an *indebitatus*, for that the defendant had accepted it. It was insisted in arrest of judgment, that an *indebitatus assumpsit* would not lie, but an action on the case only, and of that opinion were Hale and Rainsford, who said it was so adjudged in the exchequer since the king's restoration, and so judgment was stayed, *hesitante* Twissden; for he conceived that the custom made it a debt by him that accepted the bill. Vent. 152. Mich. 23 Car. 2. B. R. Brown v. London. — Freem. Rep. 14. pl. 13. S. C. accordingly. — Mod. 285, 286. pl. 32. S. C. adjournatur. — 2 Lutw. 1594. in case of Bellafaye v. Hester, it was said by Powell J. that an *indebitatus assumpsit* does not lie upon a bill of exchange, and the reporter observes, that at this time it was not denied by the other justices, and cites the case of Brown v. London, wherein judgment in like case was arrested after verdict, as reported by Levinas 298. and says it has been adjudged after verdict, that action of debt does not lie upon a bill of exchange, and cites Hardr. 485.

An *indebitatus assumpsit* does not lie upon a bill of exchange, as it has been ruled in divers cases, but against a drawer for value received there it would lie; but this is for the apparent consideration. Skin. 346. Hodges v. Steward.

2. *Assumpsit* lies on a bill of exchange accepted; per Cur. obiter. Vent. 298. Mich. 28 Car. 2. B. R. in case of the City of London v. Goree.

And cites 6 Mod. 129. 131. 1 Lev. 298. 3 Lev. 113. 1 Lutw. 280.

3. A general *indebitatus assumpsit* does not lie on a bill of exchange, but the party ought to declare specially on the custom of merchants. 2 Show. 9. pl. 5. in a nota there, Trin. 30 Car. 2. B. R. Frederick v. Cotton.

1 Salk. 125. pl. 2. S. C. held accordingly. — Skinn. 346. S. C. says, that S. P. was oftentimes said in this case. —

4. A general *indebitatus assumpsit* will not lie upon a bill of exchange for want of consideration, but bill is but evidence of a promise, and so but *nudum pactum*, and therefore he ought to bring a *special action upon the case*, upon the bill and custom of merchants, or else a general *indebitatus assumpsit* for money received to his use; per Holt Ch. J. 12 Mod. 37. Pasch. 5 W. & M. Hodges v. Steward.

— Comb. 204. S. C. says, that such action lies not against the acceptor, though accepted under hand. — 3 Salk. 68. S. C. but S. P. does not appear.

5. *Trover* for a bank bill lost will lie against a *stranger that found it*, though the payment to him would have indemnified the bank; but it lies not against the assignee of the finder, by reason of the course of trade, which creates a property in the assignee or bearer. 1 Salk. 126. Anon. coram Holt Ch. J. at Guildhall.

6. *Indebitatus assumpsit* lies not against the acceptor of a bill of exchange, because his acceptance is but a collateral engagement; but it lies against the drawer himself, for he was really a debtor by the receipt of the money, and debt will lie against him. 1 Salk. 23. pl. 3. Hill. 8 W. 3. B. R. Hard's case. [256]

7. If a bill be drawn payable to J. S. or bearer, the bearer cannot bring the action; but if it be to J. S. or order, the indorsee may, and so resolved between Hodges and Steward in B. R. Cumb. 466. Hill. 10 W. 3. B. R. Coggs's case. 3 Salk. 67, 68. pl. 2. Pasch. 12 W. 3. B. R. the S. P.

(O) Pleadings.

1. FINCH Serj. said that 6 Car. in B. R. it was ruled upon bill of exchange, between party and party not merchants, that there cannot be a declaration upon the law of merchants; but there may be a declaration upon the assumpsit, and give the acceptance of the bill in evidence. Het. 167. Pasch. 7 Car. C. B. Eaglechild's case.

2. In assumpsit the plaintiff declared that the custom of merchants is, if one, for wares delivered to him or his factor, makes a bill of exchange directed to a merchant, and he to whom it is directed accepts of it, and after refuses to pay, and this is protested before a publick notary, then he, who delivered the bill, is bound to pay it; and alledges that he delivered such wines in France to J. S. the factor of B. and he thereupon delivered a bill of exchange for the money to J. N. who accepted it, and had not paid it; and found upon non assumpsit for the plaintiff. It was assigned for error, that this action is grounded upon the custom of merchants, and it is not shewed that the plaintiff was a merchant at the time of the bill of exchange delivered; but because he is named merchant in the declaration, and the bill is for merchandises sold, it shall be intended he was a merchant at that time, and so judgment affirmed. Cro. J. 301, 302. pl. 5. Pasch. 9 Car. B. R. Barnaby v. Rigault.

3. In an action by the person to whom the bill was made payable, it was objected, that the averment is only that he did indorse the bill, but does not say that he delivered it, and so not within the custom; sed non allocatur; for the indorsement is the transferring the interest, and the action is not brought by the assignee, in which case it must be alledged, that it was also delivered; per Cur. But now neither indorsement nor delivery is needful; but per Windham, there is no failure of payment, unless the bill were delivered. 2 Keb. 303. pl. 96. Mich. 19 Car. 2. B. R. Dashwood v. Lee.

4. In case on custom of merchants, on accepting bill of exchange from Paris; the defendant demurred after issue offered on payment,

Litt. Rep. 363. Finch Serj. cites S. C. but there is an omission of the word (not) before the word (merchants), and so seems to be misprinted.

ment, and excepted, that *no time appears when the bill was payable, being only on double usance, and no particular custom alleged that double usance signifies two months; sed non allocatur; it being a known term among merchants that usance is a month, double two months; and being averred he had not paid in two months, it is well enough, and judgment for the plaintiff, the defendant having waived advantage hereof by pleading payment; but by Twisden J. had it been on demurrer to the declaration, the plaintiff should aver a particular custom that usance signifies a month, &c.* 3 Keb. 645. pl. 60. Hill. 27 & 28 Car. 2. Smart v. Dean.

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5. Demurrer to a declaration on a bill of exchange, because it says only *that the party to whom it was directed did not accept it, but says, not that it was shown or tendered to him, and the demurrer allowed, for else it would be in the plaintiff's power to charge the drawer, when perhaps the drawee was ready to pay the money according to the tenor of the bill had it been tendered to him.* 2 Show. 180. pl. 179. Hill. 33 & 34 Car. 2. B. R. Mercer v. Southwell.

6. *Case on a bill of exchange against the drawer, the bill not being paid and payable to J. S. or bearer. Plaintiff brings the action as bearer, and on evidence ruled per Ld. Pemberton, that he must intitle himself to it on a valuable consideration, though among bankers they never make indorsements in such case, for if it comes to the bearer by casualty or knavery, he shall not have the benefit of it.* 2 Show. 235. pl. 234. Mich. 34 Car. 2. B. R. Hinton v.

7. In an action on the case on a bill of exchange, alleging the custom, and that the bill was drawn such a day, &c. but exception was taken, that *the date of the bill was not set forth, yet held per tot. Cur. that it was well enough, and they would intend it dated at the time of drawing it.* 2 Show. 422. pl. 389. Hill. 36 & 37 Car. 2. B. R. De la Courtier v. Bellamy.

8. In debt upon a bill of exchange by an indorsee, the plaintiff had judgment. It was assigned for error, that the plaintiff had *not averred in his declaration that the value was received by the drawers of the bill; sed non allocatur; for it lies not in his mouth to say so, and it is not material to him whether it was paid to them or not, and therefore judgment was affirmed.* Lutw. 885. b. 889. a. 1 Jac. 2. in Cam. Scacc. Death v. Serwonters.

9. Action sur le case on a bill of exchange brought against the acceptor by the plaintiff as administrator to the party to whom the bill was payable, on the custom of merchants; and breach was assigned *præd' tamen the defendant ad vel post præd. diem, viz. the day of payment non solvit nec aliquantulum pro eisdem hucusque contentavit.* Demurrer to the declaration, because he did say *non solvit* at or before the day, and a payment before the day is a payment at the day; but held good per Cur. because said *hucusque non, &c.* judgment pro quer. 2 Show. 437. pl. 400. Mich. 1 Jac. 2. B. R. Hilman v. Law.

Comb. 9.
S. C. it was
objected that

10. Case on a bill of exchange founded on the custom of merchants, alleging that if a bill by a merchant or trader be indorsed payable

payable to a merchant or bearer, then, &c. and doth not *aver* the plaintiff to be a merchant or trader, held nought on demurrer. 2 Show. 459, pl. 426, Hill, 1 & 2 Jac. 2. B. R. Burman v. Puckle.

the custom was laid mercatori vel alicui al' persone (omitting

the words *commercio utenti*); and Withens J. said that all the precedents are *commercio utenti* except one, which passed *sub silentio*. Judgment arrested, nisi, &c.

11. In covenant to pay so much money to the plaintiff or his assigns as should be drawn on the defendant by a bill of exchange, and the breach was assigned in non-payment. The defendant pleaded that the plaintiff, *secundum legem mercatoriam*, did assign the money to be paid to A. who assigned it to B. to whom the defendant paid 100*l*, and tendered the rest. Upon demurrer it was objected that the plea was ill, because the defendant did not set forth the custom of merchants in particular, without which the assignments are void, of which custom the court cannot take judicial notice, but it must be pleaded; and the court were of opinion that the plea was not good. 3 Mod. 226, Trin. 4 Jac. 2. B. R. Carter v. Dowrith.

Carth. 83. Mich. 1 W. & M. the S. C. [in Cam, Scacc.] the court seemed of opinion that they ought to take notice of the law of merchants, because it is part of the law of the

land, and especially of this custom concerning bills of exchange, because it is the most general amongst all their customs, and the judgment was reversed. — Show. 127. S. C. in error in the Exchequer-Chamber, the court held the plea good, and judgment was reversed.

12. Case, &c. upon a bill of exchange, wherein the plaintiff set forth the custom in London among merchants and others dwelling there, that if any merchant should draw a bill of exchange directed to another, requiring him to pay a sum of money, and if that person did accept the bill, then he became liable to pay the money *secundum acceptationem præd'* that one King drew a bill at Sandwich upon the defendant to pay 8*l*. to the plaintiff, and that the defendant accepted the bill, but had not paid the money. Exception was taken that the acceptor is to pay *secundum acceptationem suam*, and no time is mentioned in the bill itself when the money was to be paid, nor has the plaintiff set forth that the defendant accepted it to pay it at sight, or at any certain time, and so it might be that the time of payment was not past before the action brought, and this was held a good exception; but by consent the plaintiff was to amend his count. Lutw. 231. 233, Mich. 4 Jac. 2. Ewers v. Benchkin.

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13. C. drew a bill of exchange upon R. and company in Oporto for 1000 mille rees, upon the 6th of August, payable 30 days after sight, and upon the 14th of August the king of Portugal lessened the value of the mille rees 20*l*. per cent. so that it was impossible to have notice. The bill was presented for acceptance, with the advance of 20*l*. per cent. R. was ready to accept and pay at the current value, but not with the advance, and therefore there was a protest for non-acceptance, and an action was brought against the drawer. It was ruled by Holt Ch. J. that here, there not being notice, the bill ought to be paid according to the antient value; for the king of Portugal may not alter the property of a subject of England, and therefore this case differs from the case of mixed monies in Davis's Reports; for there the alteration was by the king of

England,

England, who has such a prerogative, and this *shall bind his own subjects*. Skin. 272. pl. 1. Trin. 1 W. & M. in B. R. Du Costa v. Cole.

2 Vent. 295.
S. C. but
S. P. does
not appear.
—Show.

125. S. C.
& S. P. and
so if it had
been protes-
tari causavit,
viz. the pro-
test would

have been good evidence of it. — Carth. 82. S. C. but S. P. does not appear.

14. In assumpsit upon a bill of exchange the plaintiff averred that the defendant drew the bill, and that the same was refused, and that he *protestavit sine protestari causavit* at such a time, &c. It was objected that this was uncertain; sed non allocatur; for if he had pleaded quod protestavit, he might have given in evidence that the publick notary did it. Comb. 152, 153. Mich. 1 W. & M. at Serjeant's-Inn in Fleet-street. Sarfield v. Witherly.

15. The law of merchants is, that if he who has such a bill does *lapse his time*, and does *not protest*, or *make his request*, if any accident happens by this neglect in prejudice to the drawer, he hath lost his remedy against him; but if such a thing had happened, it ought to have come of the other side; and not being so we must adjudge on the declaration. It is not necessary to shew the custom of merchants, but necessary to *shew how the usage shall be intended*, because it varies as places do. 12 Mod. 16. Hill. 3 W. & M. Megadow v. Holt.

16. The plaintiff declared on a *special custom in London*, for the bearer to have this action; to which the defendant demurred, without traversing the custom; so that he confessed it, whereas in truth there was no such custom; and the court was of opinion that, for this reason, judgment should be given for the plaintiff; for though the court is to take notice of the law of merchants, as part of the law of England, yet they cannot take notice of the custom of particular places; and the custom in the declaration being sufficient to maintain the action, and that being confessed, he has admitted judgment against himself. 1 Salk. 125. pl. 2. Pasch. 3 W. & M. B. R. Hodges v. Steward.

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12 Mod. 15,
16. Hill. 3
W. 3. Meg-
adow v.
Holt, S. C.
adjudged for
the plaintiff,

and held that it is not necessary to shew the custom of merchants; but it is necessary to *shew how the usage shall be intended*, because it varies as places do.

It is sufficient to say that such a person, *secundum usum et consuetudinem mercatorum*, drew a bill; and the setting forth the custom is Yurplusage; for this custom of merchants, concerning bills of exchange, is part of the common law, of which the judges will take notice *ex officio*. Carth. 270. Pasch. 5 W. & M. in B. R. Williams v. Williams.

18. Action sur le *case by an indorsee against the first drawer of a bill of exchange*. The defendant pleaded that the indorfor, at the time of the indorsement, *was a bankrupt*. Demurrer. Per Cur. this is a good plea in bar; for a bankrupt is disabled to assign a bill; but then he ought to have pleaded a *commission taken out*, wherefore jud' pro quer. 12 Mod. 50. Hill. 5 W. & M. Baterson v. Goodwin.

19. In

19 In action upon a bill of exchange there is *no need to allege any custom*; per Treby Ch. J. et non negatur by any of the other justices. 2 Lutw. 1585. Hill. 8 W. 3. in case of Bromwich v. Loyd.

2 Lutw. 1594. Trin. 9 W. 3. in case of Bel-laise v. Hester, the

reporter says nota, that in the declaration in the principal case no custom at large for bills of exchange is alleged, but only that the *defendant negotiating, &c. secundum usum mercatorum facit billam, &c.* and no exception was taken to it.

20. Bills of exchange are of so general use and benefit, that upon an indebitatus assumpsit a bill of exchange *may be given in evidence* to maintain the action; per Treby Ch. J. and Powel J. said that upon a general indebitatus assumpsit, for monies received to the use of the plaintiff, a bill of exchange may be left to the jury to determine whether it was for value received or not, 2 Lutw. 1585. Hill. 8 W. 3. in case of Bromwich v. Loyd.

21. In case on a bill of exchange the plaintiff set forth the custom of merchants, &c. and that one J. P. drew a bill upon the defendant, payable to the plaintiff; that the bill was presented to the defendant, who *accepted it upon condition to pay it by a bank-bill*, to which the plaintiff agreed; and that the defendant in consideration thereof, *promised to pay the money in a bank-bill, which should be of good and old date, and assigns the breach in giving him a bank-bill payable to one Philips or bearer, dated 1 July 1696, in which the defendant had no manner of property or interest, so that the plaintiff could not, nor can as yet receive the money.* After verdict it was moved in arrest, *that the breach was not well assigned; for it ought to be assigned in the same manner as the promise was made, viz. that he did not pay the money in a bank-bill of good and old date; and also for want of averring that the bill made by P. &c. was made according to the custom of merchants, pursuant to the custom alleged in the declaration to this purpose.* Sed non allocatur; for it shall be so intended. Lutw. 277. Hill, 8 W. 3. Mannin v. Cary.

22. A bill *accepted for money won at play.* The acceptor may well *plead the statute* in bar; for though the acceptance makes a new contract, yet it stands on the former consideration; and if this plea should not be good, the statute would be eluded. Indeed if the plaintiff had *indorsed the bill over bona fide to another, who was ignorant of the iniquity*, the statute could not have been pleaded against such an indorsee; but sure it may against him who is party to the wrong. Jud' pro defendant. 12 Mod. 96, 97. Trin. 8 W. 3. Hufsey v. Jacob.

5 Mod. 175. S. C. adjudged accordingly. Carth. 356. S. C. adjudged accordingly. Salk. 344. pl. 2. S. C. held accordingly.

23. An action on the case was brought on a bill of exchange; to which the defendant pleaded, *that after the acceptance of the bill, he gave a bond in discharge thereof*; and upon demurrer to this plea, it was objected that it amounted to the general issue, for the debt upon the bill being extinguished by the bond, the defendant *ought to have pleaded non assumpsit, and to have given the bond in evidence*; and the court seemed of that opinion, but by consent the defendant did plead the general issue. 5 Mod. 314. Mich. 8 W. 3. Hackshaw v. Clerke,

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24. In case on a bill of exchange drawn upon 2 partners in trade, and which was accepted by one only. Exception was taken to the declaration, because it was *per consuetudinem Angliæ, &c.* and therefore ill, because the custom of England is the law of England, of which the judges ought to take notice without pleading; *sed non allocatur*; for though heretofore this has been allowed, yet of late time it has always been over-ruled; and in an action against a carrier, it is always laid *per consuetudinem Angliæ, &c.* *Ld. Raym. Rep. 175. Hill. 8 & 9 W. 3. Pinkney v. Hall.*

25. Another exception was, that though *lex mercatoria* is part of the law of England, yet it is but a particular custom among merchants; and therefore it *ought to be shewn in London or some other particular place*; *sed non allocatur*; for the custom is not restrained to any particular place. And *Hardr. 485.* it is laid as here. *Ld. Raym. Rep. 175. Hill. 8 & 9 W. 3. Pinkney v. Hall.*

26. Another exception was, that it is *not said, that the said J. S. promised for the defendant and himself upon the account of trade*, and it may be that this was for rent or some other thing for which the partner is not liable. *Sed non allocatur*; for the plaintiff having declared so specially upon the custom, it shall be *intended this was for merchandising, especially since the defendant has demurred generally.* And if the case had been otherwise, the defendant might have pleaded it. *Ld. Raym. Rep. 175, 176. Hill. 8 & 9 W. 3. Pinkney v. Hall.*

27. Another exception was, that the declaration is, that *Hutchins indorsavit billam prædictam solubilem to the plaintiff*, which is nonsense; for it ought to be that he indorsed the bill, that the defendant should pay, &c. *sed non allocatur*; and judgment given for the plaintiff. *Ld. Raym. Rep. 176. Hill. 8 & 9 W. 3. Pinkney v. Hall.*

28. Assumpsit upon a bill of exchange. The plaintiff declares *that secundum consuetudinem et usum mercatorum, the acceptor is bound to pay, &c. without shewing the custom at large*, and the defendant demurred; and it was adjudged for the plaintiff; and *per cur.* it is a better way than to shew the whole at large. *Ld. Raym. Rep. 175. Hill. 8 & 9 W. 3. Soper v. Dible.*

29. In an action on a bill of exchange, unless the plaintiff declares upon a custom to support the assumpsit according to the common form, the action will not be maintainable; *per Powell J. Ld. Raym. Rep. 281. Mich. 9 W. 3.*

30. The plaintiff declared upon the custom of merchants in London, (*viz.*) in the parish of *St. Mary le Bow*, that if any person residing and trading there subscribe a note for money payable on demand, the subscriber becomes chargeable to pay the same; and that the defendant signed a note payable to the plaintiff for 20*l.* 10*s.* on demand. The defendant pleaded that, at the time of making the note, he resided at Brentford in Middlesex, absque hoc, that he resided and traded in London; and upon demurrer it was objected, that the plaintiff had not set forth where the note was made; *sed non allocatur*; because it shall be intended at *St. Mary le Bow*, for he set forth that

that the defendant apud London, in the parish aforesaid, residen' et commercia haben' fecit notam, and therefore all must be intended the same place; and the plaintiff had judgment by the opinion * of the whole court, 2 Lutw. 1582. 1585. Hill. 9 & 10 W. 3. Bromwich v. Loyd,

31. *Actions for part of the sum* in a bill of exchange, lies not without shewing the other part to be satisfied. 1 Salk. 65. pl. 2. Mich. 10 W. 3. B. R. Hawkins v. Cardee,

Carth. 466. S. C. this was on an indorsement ordering

part of the bill to be paid to plaintiff. — 12 Mod. 217. Hawkins v. Gardiner, S. C. — Ld. Raym. Rep. 360. S. C. adjudged per tot. Cur. that the declaration is ill; for a man cannot apportion a personal contract so as to make the defendant liable to 2 actions, where by the contract he is liable only to one. — The whole court were of opinion that judgment ought to be entered for the defendant; but upon importunity, leave was given to the plaintiff to discontinue upon non-payment of costs.

32. *Assumpsit on a bill of exchange against the acceptor*, wherein the plaintiff declares that one Dunkin of Bristol, the 25th of March 1696, drew a bill of exchange on the defendant, payable to the plaintiff within a month; that 16 of May 1697, the defendant accepted the bill, and promised to pay *secundum tenorem et effectum billæ*. On non-assumpsit pleaded and verdict pro quer' it was moved in arrest of judgment that the assumpsit was impossible, because made a year after the time of the bill, to pay the money according to the bill. But judgment was given for the plaintiff, for it appearing on the declaration, that the acceptance of the bill was after the day of payment, the *secundum tenorem et effectum*, must be understood to pay the bill presently; but if it had appeared on the declaration, that the acceptance was before the day of payment by the bill, there, upon the evidence, an acceptance after would have maintained the action, 12 Mod. 212. Mich. 10 W. 3. Jackson v. Pigot.

Ld. Raym. Rep. 364. Mich. 10 W. 3. S. C. adjudged for the plaintiff. — Carth. 459. S. C. and as for the words *secundum tenorem et effectum billæ*; the effect of the bill is the payment of the money, and not the day of payment, and at the most

it is only surplusage in the declaration; and judgment for the plaintiff.

33. There were 3 bills of exchange drawn for the same sum to pay (the other bills not being paid); plaintiff protested the 2d bill, and brought his action, and declared on non-payment of the said 2d bill, and had judgment by default; and upon writ of inquiry intire damages; and now it was moved in arrest of judgment, because it was not averred in the declaration, that the 1st and 3d were not paid, and that it ought to be averred, because the bills were conditional, viz. to pay the 2d if the 1st and 3d were not paid. But it was answered that the allegation, that the money in *billæ prædictæ* mentionat' was not paid, did supply the want of that averment, because the sum was the same in all the bills; and judgment was for the plaintiff. Carth. 510. Hill. 11 W. 3. B. R. Starke v. Cheefman.

1 Salk. 128. pl. 10. S. C. but S. P. does not appear. — Ld. Raym. Rep. 538. S. C. but S. P. does not appear.

34. In case upon a bill of exchange, the plaintiff had judgment by default; it was moved in arrest that to intitle the plaintiff to a protest, the declaration only said that the person upon whom the bill was drawn non fuit inventus in so long a time, without shewing that they had made inquiry after him; but it was answered, that it was according to the custom among merchants, and according to the common

1 Salk. 128. pl. 10. S. C. but S. P. does not appear. — Ld. Raym. Rep. 538. S. C. but S. P. does not appear.

common form in such cases; and the plaintiff had judgment. Carth. 509, 510. Hill. 11 W. 3. B. R. Starke v. Cheeseman.

35. An indeb' assump' upon a bill of exchange by Domingo Franea; it appeared upon the declaration that there were *several indorsements*, and the action was brought by the *first indorser*, who *struck off the several indorsements*, and brought action for non-payment; the bill did specify *value received* of the plaintiff. Holt said, if the action had been *upon the custom*, in this case the way had been for the plaintiff to get the last indorsee to *indorse it to him*, for him to bring action as indorsee; but this action he said well lay, for the bill was given as a security for money, and without doubt it was a debt. 12 Mod. 345. Mich. 11 W. 3. Anon.

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36. Then it was argued that the declaration *shews a protest for want of payment*, when it was in truth for *want of acceptance*, as appeared by the protest, yet it was ruled well; because this was *not upon the custom*, but a plain debt, and one might bring *debt or indebitatus assumpsit* upon a bill of exchange, because it is in the nature of a security. 12 Mod. 345. Mich. 11 W. 3. Anon.

Carth. 509, 510. S. C. and objected that it was not laid that the defendant promised to pay the money to them after the protest made, or that he had any notice

37. In an action against the drawer; the plaintiff declared on the custom of merchants, and *set forth that the drawee refused to pay, per quod onerabilis devenit*, &c. but *laid no express promise*; after judgment by default, and a writ of inquiry, it was moved in arrest, that the declaration had set forth the custom, but not an express promise to pay. But it was answered that it is *sufficient to count upon the custom*, because the custom makes both the obligation and promise; and Holt Ch. J. held that the drawing the bill is an express promise; and judgment for the plaintiff. 1 Salk. 128. pl. 10. Mich. 11 W. 3. B. R. Starkey v. Cheeseman.

of the protest; but adjudged for the plaintiff. ———— Ld. Raym. Rep. 538. S. C. adjudged for the plaintiff; because the drawing the bill was an actual promise.

38. *Though an acceptance was within the 3 days of grace, viz. the last day, within which time payment is good, and no protest for want of payment can be made, unless the said days are elapsed*, yet it is a breach not to have paid the money within the *usage*, and the plaintiff has *no need to say in his declaration* upon a bill of exchange, *that he did not pay the money within the days of grace*; but if the fact was, that it was then paid, it ought to be shewn of the other side; per Sir Barth. Shower, Arg. and Holt Ch. J. and Northey agreed the same to be so. Ld. Raym. Rep. 574, 575. Trin. 12 W. 3. Mutford v. Walcot.

39. If a bill is accepted, it is not necessary to allege any promise of payment; for the *acceptance is an actual assumption*, and the *declaration need not to allege more*; and though where the bill was drawn payable at Amsterdam, some house where the money ought to be paid at Amsterdam should be named, or otherwise the party may protest the bill, yet if it is accepted, the acceptor becomes liable thereby. Comyns's Rep. 75. pl. 49. Trin. 12 W. 3. Gregory v. Walcup.

40. A bill of exchange was directed to A. or in his absence to B. and began thus: *Gentlemen, pray pay*. The bill was tendered to A. who promised to pay it as soon as he should sell such goods: and

in an action against him for non-payment, the declaration was of a bill directed to him, without taking any notice of B. and Holt held it well. 12 Mod. 447. Pasch. 13 W. 3. Anon.

41. A bill of exchange was thus: *pray pay this my first bill of exchange, my 2d and 3d not being paid.* In the declaration the indorsement was set forth thus, viz. that the drawer [drawee] indorsavit super billam illam content' billæ illius solvend' to the plaintiff, without setting forth that the bill was subscribed. It was moved in arrest of judgment, that there was *no averment, that the 2d and 3d bill were not paid*, which is a condition precedent; but per Cur. that must be intended, for the plaintiff could not otherwise have had a verdict, and therefore this indorsement likewise aided by their finding quod assumpsit. 1 Salk. 130. pl. 14. Mich. 1 Ann. B. R. East v. Estington.

all; for the promise is conditional to pay this, if the 2d or 3d be not paid, and therefore if the 2d or 3d was paid, they could not find for the plaintiff. — 2 Ld. Raym. Rep. 810. S. C. adjudged for the plaintiff.

7 Mod. 86, 87. S. C. the court said, that however it might have been on demurrer, it will be well after verdict; for if the 2d or 3d were paid, there had been no promise at

42. Since the statute of 9 & 10 W. 3. cap. 17. a *protest* was never set forth in the declaration; per Holt Ch. J. and Powell J. 3 Salk. 69. pl. 6. in case of Borough v. Perkins.

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43. An *assumpsit* was brought by one B. against C. on a foreign bill of exchange to pay, according to the custom of merchants, so much money at 2 usances, viz. at Amsterdam, but it did not appear what the time of those usances was. Holt Ch. J. said, he would take notice of the custom of merchants, but not of that at Amsterdam or Venice, &c. In such case, you must set forth the custom in your declaration. 11 Mod. 92. pl. 18. Trin. 5 Ann. B. R. Buckley v. Cambden.

Plaintiff must shew what the usances are; for the court cannot take notice of foreign usances which vary, being longer

in one place than in another. 1 Salk. 131. pl. 18. Hill. 7 Ann. B. R. Buckley v. Campbell.

44. A bill of exchange was drawn payable to A. but has *no day mentioned when it should be paid*. A. on sight of the bill, promised to pay it on the 18th of April. It was objected, that the action must be founded on the new agreement, and not on the custom of merchants; but per Powell J. the custom of merchants is by the acceptance, and promise to pay at such a time is good, and he is bound by the custom of merchants by the acceptance to pay at the time appointed, and therefore the declaration on the custom of merchants is good; and if it should not bind on the custom of merchants, it would not bind at all; because no indebitatus assumpsit lies on the acceptance; and judgment for the plaintiff, nisi, by 3 judges, absente Holt. 11 Mod. 190. pl. 5. Mich. 7 Ann. B. R. Walker v. Atwood.

45. In action against the 2d indorser of a promissory note, the plaintiff declared without any averment, that the money was demanded of the drawer or the 1st indorser. This was moved in arrest of judgment, but held good, because the indorser charges himself in the same

But it was held e contra. 1 Salk. 126. pl. 6. Mich. 10 W. . by

Holt Ch. J., same manner as if he had originally drawn the bill. 1 Salk. 133. at Guildhall pl. 20. Trin. 9 Ann. B. R. Harry v. Petit.
and that the indorsee cannot sue the indorser, unless he first endeavours to find out the drawer, to demand it of him, and such endeavour must be set forth in the declaration. Anon.

46. An action was brought against the indorser of a promissory note, wherein the plaintiff declared, *that one Coates fecit notam in writing*, by which he promised to pay to the defendant, or order, so much money, &c. that the defendant indorsed this note to the plaintiff, and that licet he demanded the money de eodem Coates, he did not pay it. The defendant demurred specially, for that the plaintiff did *not set forth, that Coates, of whom the money was demanded, was the same Coates who drew the bill*; to which it was answered, that the declaration sets forth, that the note was made by one Coates, and that the plaintiff *demanded the money de eodem Coates*, which is a good and certain averment that he was the same person, and the court was of that opinion. 8 Mod. 307. Mich. 11 Geo. Elliott v. Cowper.

2 Ld. Raym. 47. Then it was objected, that *the statute*, which gives credit to such notes, and a remedy to recover on them where there was none at law, *enacts, that all notes signed by any person, &c. and it does not appear by this declaration, that Coates signed this note.* To which it was answered, that the plaintiff set forth that Coates *fecit notam, which implies signing it.* The plaintiff had judgment. 8 Mod. 307. Mich. 11 Geo. Elliott v. Cowper.

point, wherein, notwithstanding this very exception, the plaintiff had judgment, because it was said, *fecit notam suam per quam promissit solvere*, which implied, that it was signed by the defendant, which case Pratt Ch. J. remembered, and judgment was given for the plaintiff.

So where the declaration was, that the defendant made the note for himself and partner, and subscribed it with his own hand, whereby defendant promised for himself and partner to pay, the court held it very good; for this shews sufficiently that he signed it for himself and partner, and judgment for the plaintiff. 2 Ld. Raym. Rep. 1484. Trin. 13 Geo. 1. and 1 Geo. 2. Smith v. Jarvis.

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Barnard. 48. A bill of exchange need not be *expressly averred to be within* the custom of merchants, but if, as set out in the declaration, it appears to be within the custom, it is sufficient. 2 Ld. Raym. Rep. 1542. Mich. 2 Geo. 2. Ereskine v. Murray.

Barnard. 49. Plaintiff declared, that M. made his bill of exchange in writing to E. the defendant directed, and by the said bill requested the said E. on such a day, to pay to M. the plaintiff, or order, 200l. pro valore in manibus ipsius E. de denariis accommodatis de eodem M. that E. accepted the bill, and promised to pay, &c. Plaintiff had judgment by nil dicit, and in error brought, exception was, that it was *not averred that the bill was signed.* But as to this it was answered, that it is *alleged that the plaintiff made his bill of exchange in writing, directed to the said E. and by the said bill requested*, which necessarily implies the plaintiff's name wrote in the bill, else he could not request, and the saying he made the bill in writing, imports, that he, or somebody by his authority, wrote, which is all one, and imports assigning, if it be necessary in case of inland bills of exchange; and such a way of declaring

was

was held sufficient in case of promissory notes, where the stat. 3 & 4 Ann. cap. 9. requires, that the party that makes the bill, or some person intrusted by him, should sign it. (See Elliot v. Cooper, *supra*.) And another exception was, for that it was de denariis accommodatis (de eodem M.), whereas it is nonsense, and should be (per eundem M.). But the court held, that pro valore in manibus ipsius E. had been sufficient, and that the other words might be rejected as surplusage, and they held, that the meaning was (lent by the said M.), though the Latin might not be so correct. And judgment in C. B. was affirmed in B. R. 2 Ld. Raym. Rep. 1542. Mich. 2 Geo. 2. Erektine v. Murray.

a promissory note, to bring the plaintiff within the stat. 3 & 4 Ann. cap. 9. which requires it; but they doubted whether a bill of exchange shall not be considered as a technical word, and consequently will include the circumstances of signing, and affirmed the judgment.

not require in general, that the acceptance shall be by under-writing; but says, that the court seemed to think, that a signing is necessary to be laid in an action upon

50. The plaintiff declared, that *A. and B. fecit quandam notam suam in scriptis vocatam a promissory note, & eandem notam adtunc & ibidem cum manu sua propria, &c. jointly or separately, promised to pay 1100l. for value received.* There was verdict and judgment for the plaintiff. It was assigned for error, that the note is laid to be made by 2 persons, A. and B. and the verb is fecit in the singular number, so that does not appear to be made by A. against whom the action was brought, but it might be made by B. and it does not appear to make A. liable by his signing; neither does the note import, that they promised severally; for it ought to have been, that they promised jointly and separately. And judgment for these reasons was reversed. 2 Ld. Raym. Rep. 1544. Mich. 2 Geo. 2. Neale v. Ovington.

(P) Evidence.

1. *A. Gives to B. a bill of exchange on C. in payment of a former debt,* this will not be allowed as evidence on non assumpsit unless paid, though B. kept it in his hands long after it was payable; for a bill shall never go in payment of a precedent debt, unless it be part of the * contract that it should do so. 1 Salk. 124. pl. 1. coram Holt Ch. J. at Guildhall, 3 W. & M. Clark v. Mundal.

3 Salk. 68. pl. 4. S. C. in much the same words, —12 Mod. 203. Trin. 10 W. & M. at Guildhall, S. C. & S. P. ruled accordingly.

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2. In case upon a bill of exchange upon the evidence at the trial before Holt Ch. J. at Guildhall, Nov. 23. Mich. 12 W. 3. the case was thus: *A. drew a bill of exchange upon B. payable to C. at Paris. B. accepted the bill. C. indorsed it, payable to D.—D. to E.—E. to F.—F. to G.—G. demanded the bill to be paid by B. and upon non-payment G. protested it within the time, &c. and then G. brought an action against D. and it was well brought, and he recovered. Afterwards D. brought an action against B. and though D. produced the bill and the protest, yet because he could not produce a receipt for the money paid by him to G. upon the protest, as the custom is among merchants, as several merchants upon their oaths affirmed, he was nonsuit. But Holt seemed to be of opinion,*

opinion,

opinion, that if he had *proved payment by him to G.* it had been well enough. Ld. Raym. Rep. 742, 743. *Mendez v. Carreroon.*

12 Mod.
244. Mich.
20 W. 3. at
Guildhall,
coram Holt
Ch. J.

Lambert v. Oakes, S. P. and seems to intend S. C.—Ld. Raym. Rep. 443, 444. S. C. & S. P. accordingly.

He must
prove that
he demand-
ed, or did
his endea-
vour to de-
mand it of
the drawer
before he can
sue upon the
indorsement.

12 Mod. 244. Mich. 20 W. 3. *Lambert v. Oakes*, S. C.—Ld. Raym. Rep. 443. S. C. & S. P.

12 Mod.
244. Lam-
bert v.
Oakes, S. P.
and seems to
be S. C.—
Ld. Raym.
Rep. 443. S. C. & S. P.

3. Indorsee need not *prove* the drawer's hand, because though it be a *forged bill*, the indorfor is bound to pay it. 1 Salk. 127. pl. 9. Pasch. 11 W. 3. coram Holt at Guildhall. *Lambert v. Pack.*

4. Indorsee must prove that he *demanded* it of the drawer, or him on whom it was drawn, and that he refused to pay it, or that he sought him, and *could not find him*; for otherwise he cannot resort to the indorfor. 1 Salk. 127. pl. 9. Pasch. 11 W. 3. coram Holt at Guildhall. *Lambert v. Pack.*

5. The *demand* must be proved *subsequent to the indorsement*; for if it was precedent, he could only act as servant to the indorfor, and so the demand insufficient to charge the indorfor, 1 Salk. 127. pl. 9. Pasch. 11 W. 3. coram Holt Ch. J. at Guildhall. *Lambert v. Pack.*

6. If the *action* be brought *against the indorfor*, it is not necessary to *prove the hand of the drawer*; for though it be forged, the indorfor is liable; per Holt Ch. J. at Guildhall. Ld. Raym. Rep. 443, 444. Pasch. 11 W. 3. *Lambert v. Oakes.*

7. Plaintiff to shew a protest, produced an *instrument attested by a notary public*; and though it was insisted upon that he should *prove this instrument*, or at least *give some account how he came by it*, Holt ruled it not to be necessary; for that, he said, would destroy commerce and public transactions of this nature. 12 Mod. 345. Mich. 11 W. 3. at nisi prius, coram Holt. Anon.

8. If a man has a bill of exchange, he may *authorize another to indorse his name* upon it *by parol*; and when that is done, it is the same as if he had done it himself; per Holt Ch. J. 12 Mod. 564. Mich. 13 W. 3. at nisi prius. Anon.

9. Action on a bill of exchange, being *by an executor*; and upon a debt laid to be due to testator, he held it necessary to *prove the acceptance was in the testator's time*; per Holt Ch. J. 12 Mod. 447. at nisi prius, coram Holt, Pasch. 13 W. 3. Anon.

10. If a man gives a note for money payable on demand, he needs not prove any *consideration*. 2 Freem. Rep. 257. pl. 324. says it was so held, and that the practice is so. Trin. 1702. *Crawley v. Crowther.*

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11. Plaintiff had a bill of exchange drawn on the defendant, which he *indorsed, and delivered to J. S. who went to the defendant to get it accepted. J. S. left it with him, and it was afterwards lost*; thereupon the plaintiff brought trover. The court were all of opinion, that the bare indorsement, without any other words purporting

porting an assignment, does not make an alteration of the property; for it may still be filled up either with a receipt or an assignment, and consequently *J. S. is a good witness.* 1 Salk. 130. pl. 15. Pasch. 2 Ann. B. R. Lucas v. Haines.

12. Whether the want of a consideration of a promissory note can be given in evidence on the statute of 3 & 4 Ann. cap. 9. see G. Equ. Rep. 154. Mich. 8 Geo. 1. Brown v. Marsh.

13. As to notice given by the indorsee to the acceptor before he commenced his action, that he must provide the money, it was offered in evidence, that he gave him notice by sending him a letter to do so. But the Ch. J. said, that he did not think the bare sending a letter to the post-house would be sufficient evidence of notice, without some further proofs of the acceptor's receiving it; and besides he said, that generally a personal demand is expected. Barnard. Rep. in B. R. 199, 200. Trin. 2 Geo. 2. Dale v. Lubeck.

14. To prove an indorsement over of a bill of exchange, it was offered that the defendant had himself confessed that he was come to town to hasten on the trial of an action that was brought against him, upon an indorsement that he had made on a bill of exchange. And the counsel said that this very cause was brought down by proviso; so that it is strong evidence that it is for the same matter; and the Ch. J. at the sittings at Guildhall, allowed this to be good evidence of the indorsement. Barnard. Rep. in B. R. 199. Trin. 2 Geo. 2. Dale v. Lubeck.

(Q) Recovered. What. Damages, &c.

1. *INTEREST* on a bill of exchange commences from demand made, and therefore, if there was no demand made till action brought, the defendant may plead tender and refusal, and uncore prist, and so discharge himself of interest; but if it be the defendant's fault that the demand could not be made, as if he were out of the kingdom, there want of demand ought not to prejudice the plaintiff; per Cur. 6 Mod. 138. Pasch. 3 Ann. B. R. Anon.

indorsee, and held well, and interest was ruled to be paid from the time of the protest. Trin. 10 Ann. B. R. Louviere & Laubray.

Drawer accepts the bill, and some time after protests it, and thereupon the bill is indorsed to the drawer, who brought action is 10 Mod. 36.

2. 3 & 4 Ann. cap. 9. s. 5. No acceptance of such inland bill shall charge any person, unless underwritten or indorsed; and if not so underwritten or indorsed, no drawer to pay costs, damages, or interest, unless protest be made for non-acceptance, and within 14 days after protest the same be sent, or notice thereof given to the party from whom such bill was received, or left in writing at his usual place of abode; and if such a bill be accepted, and not paid within 3 days after due, no drawer shall pay costs, damages, or interest thereon, unless protest be made and sent, or notice given as aforesaid; nevertheless, the drawer shall

Since this statute it has been adjudged that an indorsee of an inland bill of exchange may maintain an action against the acceptor, on

a parol acceptance, as to the principal sum, though not

shall be liable to payment of costs, damages, and interest, if any protest be made for non-acceptance or non-payment, and notice be sent, given, or left.

as to interest and costs; for the act being made to give a further remedy * for interest, damages and costs against the drawer, cannot be supposed to take any advantage from the payee which he had before, and therefore the true construction of the act is, that to charge the drawer with interest and costs, the drawee must refuse to accept it in writing; nevertheless if he accepts the bill by parol, he is liable to the principal sum in the bill as he would have been before the act. 3 New. Abr. 611. cites Mich. 8 Geo. 2. B. R. Lumley v. Palmer.

(R) Remedy for Bills lost.

1. **A** Bill of exchange was accepted by the drawee, by underwriting his name; but the person to whom it became payable by indorsement, lost or mislaid it; and the drawee refusing payment, the indorsee exhibited his *bill in chancery, setting forth the refusal, and that he offered to give security to the defendant to indemnify him, and annexed an affidavit to the bill of the losing or mislaying it.* This being confessed by the answer, it was objected that it did not appear by the plaintiff's affidavit that he had not assigned the bill to another; but decreed that defendant pay the money, the plaintiff giving security to indemnify the defendant, as the master shall think reasonable, against any person that may hereafter demand the same. Fin. Rep. 301. Pasch. 29 Car. 2. Tercese v. Geray.

2. 9 & 10 W. 3. cap. 17. s. 3. Enacts that if any inland bills of exchange for 5 l. or upwards for value received, drawn payable at a certain number of days, &c. after the date thereof, be lost or miscarried within the time limited for payment of the same, the drawer of the said bills shall give other bills of the same tenor, security being given (if demanded) to indemnify him, in case the said bills so lost, or miscarried, be found again.

3. A bank bill payable to A. or bearer was lost, and found by B. a stranger. B. for a valuable consideration transferred it to C. who got a new bill in his own name; Holt Ch. J. held, that A. may have *trover* against B. who found the bill, because he had no title, though the payment to B. would have indemnified the bank, but not against C. to whom it was assigned, by reason of the course of trade, which creates a property in the assignee or bearer. 1 Salk. 126. pl. 5. at Guildhall coram Holt Ch. J. Mich. 10 W. 3. Anon.

4. By 3 & 4 Ann. cap. 17. s. 2. Actions to be brought upon notes mentioned in the statute, shall be brought within the time appointed for bringing actions by the statute of 21 Jac. cap. 16.

5. If a promissory note be indorsed and afterwards lost, and passed in way of trade to a 3d person for a valuable consideration, the indorsee may have *trover* for the note against the third person; per Baron Price, which the other barons did not deny. 9 Mod. 47. Trin. 9 Geo.

(S) Equity.

1. **A.** Requested B. to let him have 50l. in London, and he would draw a bill on C. in the country, *to repay it to B. as soon as B. should return home.* B. gave 2 bills to A. one for 20l. and another for 30l. payable at 20 days sight, which the drawee accepted. On B.'s return, drawee in the country refused to pay A.'s bill. B. on this, writes to stop payment of his bills, but one was paid before, but the drawee refused to pay A. the other. Decreed A. to pay back the 20l. received, and a perpetual injunction against A. for the other 30l. Fin. R. 356. Pasch. 30 Car. 2. Hill and Penford v. Baker.

2. Bill for relief against a *bill of exchange*, on pretence of its being gained by threats or menaces, is not proper for equity, it being a matter at law, and *duress* a good plea there; but being *gained by fraud*, and for a fictitious consideration, it was relieved per Commissioners. 2 Vern. 123. pl. 123. Hill. 1690. Dyer v. Tymewell.

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2 Freem.
Rep. 112.
pl. 123. S. C.
but not fully
S. P.

For more of Bills of Exchange in general, see **Payment (A)** and other proper titles.

(A) Blanks.

1. **I**F spaces are left for the addition of the *parish* and such things in the *record*, this the judges cannot amend; for it is out of their knowledge. Arg. Savil. 87, 88. pl. 165. Pasch. 28 Eliz.

2. Blank left in a *bond* for the *christian name of the obligor*, who subscribed his christian name, is good. Cro. J. 261. pl. 22. Mich. 8 Jac. B. R. Dobson v. Keyes.

3. If a man be bound *to pay to (blank)* and seals it, and *afterwards a name is put in*, this is not a good bond; per Jones J. 2 Show. 161. pl. 146. Pasch. 33 Car. 2.

4. Blanks were *filled up after the execution* of a deed, and the deed not read again to the party nor re-sealed, and executed; yet held a good deed. 2 Ch. Rep. 410. 3 Jac. 2. Paget v. Paget.

5. If a judgment is entered on the roll with blanks, they may be filled up without notice within the year. Cumb. 71. Hill. 3 & 4 Jac. 2. Anon.

6. Debt upon a bond; and upon oyer the defendant demurred, and shewed for cause that the bond was void, being *noverint universi*, &c. *me J. S. teneri & firmiter obligari Richardo de Wood street, &c. solvend' eidem Richardo Bishop*. But the court held the bond good, and gave judgment for the plaintiff. 11 Mod. 275. pl. 23. Hill. 8 Ann. B. R. Bishop v. Morgan.

7. On the assignment of a promissory note payable to one or order, nothing is done but indorsing the name of the indorser, upon which the indorsee may write what he please; and at a trial, when the bill is given in evidence, the party may fill up the blanks as he pleases. Comyns's Rep. 311. pl. 160. Mich. 5 Geo. 1. C. B. Moor v. Manning.

Blood Corrupted.

(A) In what Cases.

Br. Forfeiture de Terris, pl. 89. cites S. C. [269] 1. IF the father has 2 sons, and the eldest has issue a daughter, and commits felony in his father's life, and confesses the felony, and becomes an approver, and takes his clergy, and is put to the prison of the ordinary, and there dies, and after the father dies, the daughter shall have the land, and not the uncle, because the eldest son was not attainted, by reason that no judgment of death was given; for by such judgment the land shall escheat, by reason of the attainder of the eldest son, who cannot take it. Br. Discent, pl. 44. cites 8 E. 1. and Fitzh. Affise, 421.

Hawk. P. C. 68. cap. 27. f. 8. S. P. 2. Being a *felo de se* is no corruption of blood; for corruption of blood cannot be without attainder in fact; agreed by all the justices. Pl. C. 261. b. Mich. 4 & 5 Eliz. Hales v. Pettit.

3. Attainder of *heresy* or *premunire* works no corruption of blood. Co. Litt. 391. a.

No attainder of piracy wrought corruption of blood at the common law. 1 Salk. 85. pl. 1. at the Old Bailey 1696. in case of the King v. Morphis. — Attainder for piracy corrupts not the blood, inasmuch as the statute only says, that the offender shall suffer such pains of death, &c. as if he were attainted of a felony at common law; but says not that the blood shall be corrupted. Hawk. Pl. C. 99. cap. 37. f. 8. — Where the proceedings are by the civil law, a condemnation for a capital offence causes neither forfeiture of lands nor corruption of blood; for corruption of blood can be caused only by a judgment by course of the

the common law. 2 Hawk. Pl. C. cap. 4. f. 10; and cap. 23. f. 12.——S. P. Hale's Hist. of H. C. 354, 355. cap. 27. but says if there be an attainder of treason or felony done upon the sea, upon this statute of 28 H. 8. by jury, according to the course of the common law, it seems that the judgment thereupon works a corruption of blood, because the commission itself is under the great seal, warranted by act of parliament, and the trial is according to the course of the common law, and therefore the proceedings and judgment thereupon is of the same effect as an attainder of foreign treason by commission upon the statute of 35 H. 8. cap. 2. or any other attainder by the course of the common law; and with this agrees Co. Litt. f. 745. pag. 351. Nay, I think farther, that if the indictment of piracy before such commissioners upon the statute of 28 H. 8. be formed as an indictment of robbery at common law, viz. vi & armis & felonice, &c. that he might be thereupon attainted, and the blood corrupted; for whatever any say to the contrary, it is out of question that piracy upon the statute is robbery, and the offenders have been indicted, convicted, and executed for it in B. R. as for a robbery, as I have elsewhere made it evident. But indeed if the indictment before these commissioners run only according to the stile of the civil law, viz. piratice deprædavit, then the attainder thereupon, upon the statute of 28 H. 8. though it gives the forfeiture of lands and goods, corrupts not the blood; and so are these 2 books of the same author, Co. P. C. cap. 49. and Co. Litt. f. 745. to be reconciled, which, without this diversity, would be contradictory; and cites Hill. 13 Car. B. R. Hilliar v. Moore.

5. 1 Jac. 1. No attainder for bigamy shall work any corruption of blood, loss of dower, or disherison of the heirs.

6. 21 Jac. 1. f. 26. It is felony without benefit of clergy to acknowledge, or procure to be acknowledged, any fine, recovery, deed inrolled, statute, recognizance, bail, or judgment in the name of any person not privy or consenting thereto; howbeit this offence shall not corrupt the blood.

7. Where a statute saves the land to the heir, it so far prevents the corruption of blood. Hawk. Pl. C. 107. cap. 40. f. 5.

8. An attainder of treason works corruption in all cases where-ever the treason be done, except only attainders before the constable, marshal, or admiral; the reason whereof was, because there could be no record made of it, but here there is. (This was attainder of treason by commission on 28 H. 8. 15.) 1 Salk. 85. pl. 1. at the Old Bailey 1696. The King v. Morpheus.

(B) Who shall be barred.

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1. **W**HERE a father is seised in fee, and the son is attainted in the life of the father, and the father dies, and the son survives, there no other shall have the land as heir; but the lord shall have the writ of escheat, supposing that the tenant died without heir; per Newton. Br. Discent, pl. 12. cites 22 H. 6. 38.

2. A man hath issue 2 sons, and the eldest in the life of the father is attainted of felony, and dies, living the father, and after the father dies seised of land in fee. If the land shall escheat or not, was the question; and it was held by Brown, Coningsby, Molineux, and Hales, that the land shall enure to the youngest son as heir to his father, if the eldest had no issue alive; but if he had issue alive, (so that he is inheritable by the law, if it was not for the attainder,) the land shall escheat to the lord, and shall not go to the youngest son. Quod nota, pro diversitate legis. D. 48. a. pl. 16. Mich. 32 H. 8. Anon.

the youngest, and answered currat communis lex. Ex lib. Mr. Hackwel, D. 48. pl. 16. Marg.—

At the parliament 1st H. 4. Numb. 132. petition of the commons was, that the attainder of the eldest son in the life of his father, should not be a bar to the youngest son. Fryn's

Prynn's Abr. of Cotton's Records, 396. cites the same petition and answer. — S. P. of collateral descents of lands in fee-simple, where the eldest son dies without issue, living the father, the younger shall inherit the father, because he needs not mention the elder brother in conveying of his title; but if the elder survive his father but a day, and dies without issue, the younger cannot inherit, because the corruption of the blood in the elder son surviving the father, impedes the descent. Hale's Hist. Pl. C. 356, 357. cap. 27. cites 31 E. 1. Bar, 315. But says, that otherwise it is in case the eldest son had been an alien born; for then, notwithstanding such alien son were living, the land will descend from the father to the youngest son born a denizen.

3. A man *infeoffed* several to the use of his wife for life, and after to the use of the heirs male of his body, and has a son, and after was attainted of treason anno 29 H. 8. and the wife died; and it was held that the son shall have ouster le main, as a purchaser by the name of heir male, and not as heir. Quære. Br. Descent, pl. 1. cites 37 H. 8.

Hale's Hist. Pl. C. 357. cites S. C. 4. A. and B. are brothers. A. is attainted, and has issue C. and dies, and C. purchases lands, and dies without issue. B. his uncle shall not inherit; for A. who was the *medius ancestor* was disabled; per Hale Ch. J. Vent. 416. cites 3 Inst. 241. Courtney's case.

Br. Descent, pl. 23. S. C. cites 29 Aff. 61. 5. Where the issue in tail is outlawed of felony in the life of the ancestor, and gets a pardon in the life of the ancestor, he may enter after the death of his ancestor as heir in tail; *contra* of fee-simple. But if the ancestor dies before the pardon, then it seems, by Thorpe, that the heir in tail cannot enter. The reason seems to be inasmuch as the king shall have the land during the life of the outlaw. Br. Forfeiture de Terre, pl. 37.

D. 274. a. b. pl. 40. Pasch. 10 Eliz. Grey's case. — S. C. cited Jo. 460. 6. The younger brother hath issue, and is attainted of treason, and dies. The elder brother, having a title to a petition of right, dies without issue. Without a restitution the other brother's son hath lost that title; for though that title were in an ancestor that was attainted, yet his father that is the medium, whereby he must convey that title, was attainted, and so the descent is obstructed. Vent. 425. per Hale Ch. B. cites 10 Eliz. D. 274. Graves's case.

But if the wife died before entry, after the death of the baron, the issue is barred, and the king has right to the land, because the issue cannot claim as heir to them both; for by the father he is barred. Arg. Godb. 312. cites 8 Rep. 72. 7. Baron and feme, tenants in tail of lands of the inheritance of the ancestors of the feme, have issue a son, who has issue a son, grandson to the baron and feme. The baron dies. His son commits treason, and is executed, the feme surviving. Per Ld. Treasurer & omnes barones, the grandson has good title after the death of the feme, and the land is not forfeited by the attainer of the son, he being executed in the life of the grandmother, who only as long as she lived was tenant * in tail, and the land descended to the grandson as cousin and heir of the body of the feme the grandmother. Cro. E. 28. pl. 12. Pasch. 26 Eliz. in Cam. Scacc. Mantell v. Mantell.

Arg. Godb. 312. cites 8 Rep. 72.

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8. If the eldest son kills his father, the youngest shall have an appeal against his brother; and yet if his brother be attainted at his suit, he shall never inherit his father's lands. Arg. Noy, 165. cites it as agreed by all the judges in 26 Eliz.

Where the person under whom another ought 9. Where one is attainted of treason or felony, this is absolute and perpetual disability by corruption of blood for any of his posterity to claim any hereditament in fee-simple, or as heir to him or

or to any other ancestor paramount him. 11 Rep. 1. b. 39 Eliz. Ld. Delaware's case.

to make his conveyance, is barred, in

such case such other is barred. Arg. Lat. 73. cites 31 E. 3. Fitzh. Descent, 17. and Bar. 150

10. But the *heir in tail*, in case of felony or murder by the father, shall have the land, and the blood is not corrupted; but it is otherwise in case of treason by the statute 26 H. 8. Jenk. 82. pl. 60.

When tenant in tail is attainted of treason, his blood is not corrupted.

Arg. Godb. 305. cites 3 Rep. 10. Lumley's case, and says, that the statute 33 H. 8. 20. is the first statute which vests lands forfeited for treason in the king without office found, so as according to the Ld. Lumley's case, 3 Rep. 10. before this statute of 33 H. 8. 20. the land did descend to the issue in tail. Godb. 305. in case of Sheffield v. Ratcliff.

The statutes of 26 and 33 H. 8. subject estates tail to the forfeiture by attainder of treason, and so the law stands at this day, notwithstanding the statute of 1 E. 6. and the statute of 1 Mar. But yet these acts are not absolutely a repeal of the statute of donis conditionalibus, for notwithstanding the forfeiture of the lands entailed by the attainder, yet the blood is not corrupted as to the issue in tail; and therefore if the son of the donee in tail be attainted of treason in the life of the father, and die, having issue, and then the father dies, the estate shall descend to the grand-child, notwithstanding the father's attainder; but otherwise it would have been in case of a fee simple. Hale's Hist. Pl. C. 356. cites 3 Co. Rep. 10. b. Dowrie's case. — Jenk. 82. pl. 60. S. P. and cites S. C.

11. Where a *remainder* is limited to the right heirs of J. S. and J. S. afterwards is attainted, his heir shall not take; for his blood is corrupted, and he is issue only, and not heir. Jenk. 82. pl. 60.

Jenk. 203. pl. 27. S. P.

12. If corruption of the blood of the father disables the course of descent and inheritance between the brother and the father. Mo. 569. pl. 775. Pasch. 41 Eliz. in the Exchequer, Countess of Warwick's case. No judgment.

That it does not. Cro. J. 539. cites it as adjudged 41 Eliz. in Holbie's

case. — Noy, 158. &c. S. C. by the name of the King v. Borafton and Adams, alias Altonwood's case. — 4 Le. 5. pl. 21. Sir Tho. Hobbie's case. — And see the argument of Hale Ch. B. in case of Collingwood v. Pace. Vent. 413 to 430.

13. Land is given to A. and the heirs males of his body, remainder to the heirs females of his body. If the father commits treason, both heir male and female are barred; for they both claim by the father. But if the heir male, after his father's death, is attainted of treason, the king shall have the lands as long as he has issue male of his body, and if he dies without issue, the heir female shall have the lands; for she claims by the father, and not by the brother. Arg. Godb. 311. cites Litt. 719.

14. If there be grandfather, father, and son, and the grandfather and father have divers other sons, and the father is attainted of felony, and pardoned, yet the blood remains corrupted, not only above him, and about him, but also to all his children born at the time of the attainder. Co. Litt. 392. a.

In all cases, (but only in cases of entails) attainder of treason or felony corrupts

the blood upward and downward, so that no person that must make his derivation of descent to or * through the party attaint, can inherit; as if there be grandfather, father, and son, and the father is attainted, and dies in the life of the grandfather, the son cannot inherit the grandfather. Hale's Hist. Pl. C. 356.

* [272]

15. Resolved by the two chief justices, and the chief baron, that whereas P. had covenanted by indenture for natural affection, to stand seised to himself for life, the remainder for life to F. the eldest son of his brother, the remainder to the first son of the said F. and so to the 8th son, &c. the remainder to the right heirs of P. and P. is

Mo. 815. pl. 1103. in the Star-Chamber, S. C. says, but nota, that for sundry vehement

attainted

presump-
tions of for-
gery of the
said deed,
the deed was
censured and
damned, but
no person censured.

attainted of treason, and executed *before the birth of any son to F.* that the sons born after are all utterly barred by that attainder, and the king shall have the fee discharged of all the remainders limited to the sons not yet born. Noy, 102. Trin. 9 Jac. Sir Tho. Palmer's case.

The wife is
tenant in tail
in this case,
yet the land
is forfeited
against the
issue, though

16. *Husband and wife, tenants in tail, if one is attaint of treason*, the land shall not descend to the issue; because he cannot make title as heir to them both. Arg. Godb. 312. cites 9 Rep. 140. Pasch. 10. Jac. in the Court of Wards, in Beaumont's case. It be but a possibility, for the whole estate is in the wife; but the reason is, because it was once coupled with the possession. Arg. Godb. 325. cites 9 Rep. Beaumont's case.

H. seized of
lands for 3
lives was at-
tainted on the
statute 8 &
9 W. 2. of
treason for
counterfeit-
ing the coin,
by which
statute cor-
ruption of
blood is for-
ward. The

question was, whether the lands were forfeited to the king, who had given the same, as forfeited, to Baron Lovel, who brought a bill in the Exchequer to redeem, and had a decree? On an appeal to the house of lords, the judges held, that *in felony the forfeiture to the lord is only by way of defeat, pro defectu tenantis, but in treason the lands came to the king as an immediate forfeiture, which was a distinct penalty from corruption of blood, for the corruption may be saved, and the forfeiture still remain, & vice versa, and therefore the lands forfeited in the principal case.* 1 Salk. 85. pl. 2. Hill. 8 Ann. in Dom. Proc. Sir Selachiel Lovel's case.

18. If the *mother had been attainted, the uncle could not inherit the son's land*, & sic e converso, because the uncle to the son, and the son to the uncle, in their conveyance, must needs mention the mother. Arg. Noy, 165. in case of Boraston v. Adams, [alias Hobby's case.]

* [273]
4 Le. 5. pl.
21. S. C.
accordingly.
—S. C.
cited Cro. J.
539. in pl. 7.
—S. C.
cited Hale's
Hist. Pl. C.
357.—
Noy, 158.
The King v.
Boraston,
Adams's,

19. *A. has issue, son and daughter, A. is attaint; the son purchases, and dies without issue; the daughter shall inherit to her brother; for, 1st, she was born before the attainder, and there was lawful blood, and hereditary between them, which was not lost by the corruption after; and upon the grounds which Littleton puts, if son purchase, and has no heir of the part of the father, the heir of the part of the mother shall have it; so here, though there be no lawful blood between the son and the daughter by the father, yet of the part of the mother is lawful blood.* Palm. 19. Trin. 17 Jac. Hobby's case.

alias Altonwood's case, S. C.—S. C. cited Vent. 425. per Hale Ch. B. in case of Collingwood v. Pace, and that it was ruled, that notwithstanding the attainder, the sister should inherit, because the *descent between the brother and sister was immediate*, and the law regards not the disability of the father.

* And as to the case above, Hale Ch. B. said, if it be objected, that in that case the *mother was not attainted*, which might preserve the legal blood between the brother and sister, I answer, that that would not serve, admitting the disability of the parents were not at all considerable; for if it disable the blood of the father which is derived to the son, it would infallibly destroy the descent to the sister, for she inherits her brother in the capacity of heir to the part of the mother, if by the attainder she had been disabled to take

take as heir by the father's blood. 49 E. 3. 12. If the heir on the part of the father be attained, the land shall escheat, and shall never descend to the heir of the mother, because, notwithstanding the attainder, the law looks upon it as in esse; but otherwise it is in case of an alien, for if the son purchase land, and hath no kindred on the part of his father, but an alien, it shall descend to the heir on the part of the mother; and although the blood both of the father and the mother were in the issue, yet if she were disabled in the blood of her father by his attainder, she could never intitle herself by the blood of her mother. Vent. 426. in case of Collingwood v. Pace.

20. A. devises that the heir of B. shall sell his land; B. is attainted of felony in the life-time of A.—A. dies. The eldest son of B. cannot sell this land, for he is not heir. The blood is corrupted; he is the issue of B. The word heir will not serve for a name of purchase, if he be not lawful heir, nor the word issue. The word son, or daughter, will, or reputed son or daughter, in the case of a feoffment, as well as of a will, although they be bastards. Jenk. 203. pl. 27.

21. *Duplicatus sanguis* is not necessary in descents or purchases; as where a man is seized in right of his wife, an heiress, and has issue, and the husband is attainted, and the wife dies, and the husband dies, this son shall have the land. Jenk. 203. pl. 27.

An attaind-
ed person
marries an
heiress, and
has issue by
her, the issue

shall inherit; for the marriage was lawful, and he only claims from the mother. Jenk. 3. in pl. 2.—2 Hawk. Pl. C. 457. cap. 49. s. 49. says, it seems to be the better opinion, that where a person hath issue by a woman seized of lands of inheritance, such issue may inherit the mother, though he had never any inheritable blood from the father. — And Ibid. Marg. (i) cites several modern books, and then says, that this appears from 13 H. 7. cited S. P. C. 196. and abridged Br. Tenant by the Curtesy, pl. 15. and wherein it is held, that if the husband of an inheritrix have issue, and be attainted of felony, and pardon'd, he shall not be tenant by curtesy, by reason of the issue born before the pardon, but by reason of issue born after he shall; from whence it necessarily follows, that such issue must be inheritable to the wife; also it is admitted, Co. Litt. 84. b. that the issue of an inheritrix by an alien, or a person attainted, may be in ward, which could not be unless he could inherit the mother; and cites Cro. J. 539. Litt. Rep. 28. 1 Lev. 59. 60. but says, that the contrary was anciently holden.

22. Father is attainted of felony in the life of the grandfather, and dies, leaving a son. Then grandfather dies. The land shall escheat; for the son must make his descent by the father, which he cannot; but if the eldest son had been attaint in the life of the father, and died without issue in his father's life, the second brother might inherit; but if the eldest son had survived the father and died after without issue, the younger brother should not inherit; per Berkley J. Cro. C. 435. in pl. 4. Hill. 11 Car. B. R. shall descend to the grandson, notwithstanding the 26 H. 8. 13. which gives a forfeiture of the lands of the person attainted. See 8 Rep. 166. Digby's case. — Jenk. 287. — Hob. 343. in case of Sheffield v. Ratcliff.

But if the
grandfather
be a tenant
in tail, and
the father be
attainted of
treason, and
dies, and
then the
grandfather
dies, the land

At the parliament 1 H. 4. the commons petitioned, that the attainder of the eldest son in the father's life should not be a bar to the youngest, and it was answered, curat communis lex. D. 48. Marg. pl. 16. cites Mr Hackwell.

* The corruption of blood upon this statute is only where the traitor has estate tail in the land. Jenk. 82. pl. 60. says, it was so adjudged in Ld. Lumley's case.

23. The impediment of an ancestor that is not medius ancestor between the persons from whom, and to whom, will not impede the descent; per Hale Ch. J. Vent. 416. in case of Collingwood v. Pace.

24. In immediate descents there can be no impediment but what arises in the parties themselves; as, the father seized of lands, the impediment that hinders the descent must be either in the father or the son; as if the father or the son be attaint, or an alien. In immediate descents, a disability of being an alien, or attaint in him that

See Hale's
Hist. v. l. C.
356, 357.
cap. 27.—
Though the
father is me-
dius differ-

consanguinis, yet he is not the medium differens *hereditatis*. 3 Salk. 129. pl. 4. cites S. C. & Co. Lit. 8. 2.

is called a *medius ancestor*, will disable a person to take by descent, though he himself has no such disability. As in *lineal* descents, if the *father* be *attainted*, or an * alien, and hath *issue* a *denizen* born, and dies in the life of the grandfather, and the *grandfather* dies *seised*, the son shall not take, but the land shall *escheat*. In *collateral* descents, A. and B. brothers, A. is an alien, or *attainted*, and has issue C. a *denizen* born. B. purchases lands, and dies without issue, C. shall not inherit; for A. (which was the *medius ancestor*, or medium differens of this descent) was incapable; per Hale Ch. B. 1 Vent. 415, 416. in case of *Collingwood v. Pace*.

25. A. *tenant for life*, remainder to his wife for life, remainder to the 1st, 2d, &c. sons in tail, remainder to the right heirs of A.—A. commits *treason*, and then has a son, and then is *attainted*. Held that whether the son is born before or after the *attainder*, the *contingent remainder* to him was not discharged by the vesting in the crown during the life of A. because of the wife's estate, which is sufficient to support it. 2 Salk. 576. pl. 1. Pasch. 6 W. & M. in *B. R. Corbet v. Tichbourn*.

(C) Blood Corrupted. Restored. And Restitution of what on Reversal of Attainders.

*Br. Discent, pl. 55.

1. IF the eldest son who is *attainted* of felony, gets a *pardon* in the life of the father, and the father dies, the land shall *escheat*; for the pardon cannot avoid the corruption of the blood; and therefore it is used at this day to have *restitution of the blood by act of parliament*; for the king may restore the land, but not make the heir to inherit unless by parliament. Br. Discent, pl. 44. cites 8 E. 1.

2. He who is a *clerk convicted* in the life of his father, and after gets a *pardon*, he may inherit after the death of his father. Br. Discent, pl. 42. cites 15 E. 2. and Fitzh. Corone, 382.

3. If the *issue in tail* be *outlawed* of felony in the life of the ancestor, and gets a *charter of pardon* in the life of the ancestor, he may enter; nevertheless if the charter had been after the death of the ancestor, then it seems that the king shall have the profits during his life. But per *Afcue* and *Wych*. if the pardon be in the life of the ancestor, or at any time after, the issue in tail shall have the land. But *Thorp* strictly charged the jury to find if the pardon was in the life of the ancestor or after; for if after, then the king shall have the land during his life, as it seems. Br. Discent, pl. 23. cites 29 Aff. 61.

4. Land was assured to S. by act of parliament, viz. a manor, and after a tenant who held of it in *chivalry* died, and after S. was *attainted* of *treason*, and the act reversed by parliament in all points, saving the titles of those who did not claim by the first act, which is now reversed by this last act; and the king seized the manor and granted it to his mother. Quære, if the patentee shall have the said ward, and by all the justices in effect she shall have it, because the first act is reversed in all points, notwithstanding it be only a chattel vested,

vested, and that all the mesne occupiers shall be charged of the profits. Quod quære; for it seems to be no law. Br. Parliament, pl. 39. cites 3 H. 7. 15.

5. In trespass a man was attainted of treason by act of parliament, and after he was restored by another parliament, and the attainder annulled, and that it should be void as if no act had been, and should be as ample and available to him as if no act of attainder had been; and he who was restored did trespass upon the land mesne between the attainder and the restitution; and the patentee who had patent of the land after the * attainder, brought trespass, and the other pleaded the act of restitution. Per Keble, the action lies well; for where judgment is reversed by error, the party shall not punish mesne trespass, or have the mesne profits, unless by special judgment, and such words are not here in the act of restitution; but Fineux contra, and took a great diversity where the repellant affirms the first assurance, and where it disaffirms it, as lease for years, which is determined after, or scotments upon condition, and the entry for the condition broken, &c. those affirm the possession, contra of reversals of judgments by error, or by parliament, or entry by elder title, and yet it seems that the mesne acts executed shall not be reformed. Per Fisher, if trespass is done against the heir, and after the elder brother is deraigned, yet trespass lies for the first heir; for it is an action vested; per Vavisor, those words in the act, that all shall be void and as if no attainder had been, shall be intended from this time forth, from the making of the act of restitution, and shall not have relation to mesne acts executed or vested before; and Davers and Hales accorded. Br. Parliament, pl. 41. cites 4 H. 7. 10.

Br. Relation, pl. 44. cites S. C. but leaves it a quære if thereby mesne actions which are vested, shall be avoided.

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6. And if a villein had purchased, and the patentee entered before the restitution, he who is restored after shall not have his perquisite which is vested; per Davers & Hales. Ibid.

Br. Relation, pl. 44. cites S. C. & S. P. by Hawes, that the patentee shall retain them.

7. So of words vested, and of presentments of clerks who are induced, and shall not extend to mesne acts vested; and 5 were with the action, and 6 against it, and so it was relinquished. But Brooke says it seems to him that the best opinion in reason is with the plaintiff, because it was an action vested in him before. Ibid.

8. Lord and tenant; the tenant is attainted of treason by parliament, and after the king by parliament restores him or his heir, as if no attainder had been; there the feignory which was extinct is revived; quod nota. Br. Extinguishment, pl. 47. cites 31 H. 8.

9. If a man is attainted of treason, the king may restore the heir to the land by his patent of grant; but he cannot make the heir to be heir of the blood, nor to be restored to it without parliament. Note the difference; for it is in prejudice of others. Br. Restitution, pl. 37. cites 3 E. 6.

10. If a man be attainted of felony, being seized of land, and after get a pardon and purchases other land, the heir shall inherit the last land, for the wife shall be endowed. Br. Descent, pl. 54. cites N. B.

11. Note, that the corruption of blood cannot be purged by grant; nor pardon of the king nor otherwise, unless by act of parliament;

3 Inst. 240, 241. cap. 106. S. P.

for

for the king cannot make an heir who is not inheritable by the law of the realm; quod nota. And the king may make an alien denizen, but he cannot make him heir; for he may not prejudice another who is heir, nor the lord in his escheat; and so all restitutions to the name of heir are by parliament. Br. Discent, pl. 57. cites Dr. & Stud. lib. 1.

S.P. accordingly, but if he had issue born before the attainder, and that issue is living at his death, an after-born son shall not inherit; but if such prior

born son dies in the life of the father, then the after-born son shall inherit; because he was not in being while his father's attainder stood in force, but was born after the purging of the crime and punishment by the pardon. Hale's Hist. Pl. C. 358. cap. 27. cites Litt. f. 747.

[276] 13. But if there are grandfather, father, and son, and the father is attainted of treason or felony, and dies, in this case the son shall not demand the land as heir to the grandfather, notwithstanding that the father had his pardon; for the bridge is broken, and as the father himself is barred, so is the son; per Bromley and Portman. Anno 1 Mar. quod nota. Dal. 14. pl. 3. cites Stamford, fol. 196. Trin. 9 H. 5. 9.

S. C. cited by Jones J. Arg. Jo. 490. and says that the justices certified the queen, that it was great equity and conscience to relieve the son.—S. C. as to the first point, cited by the name of Gray's al' Graves's case, by Hale Ch. B.

Vent. 416. 425.—S. C. cited by Berkley J. Cro. C. 543. pl. 8. as to the S. P.—S. C. cited 3 Inst. 240. cap. 106.

Though such pardon does not restore the blood, yet as to issue born after, it has the force of a restitution. Hale's Hist. Pl. C. 358. cap. 27.

14. The elder brother had some cause for a petition of right for lands. B. the younger brother had issue, and was attainted of treason and executed. A. died without issue. The question was whether the son of B. was barred of his petition of right by the said attainder; and it seems he is, so long as the attainder remains in force. But afterwards the son of B. is restored in blood by parliament as heir to his father, by these words, (viz.) that he and his heirs shall be enabled only in blood as son and heirs of his father, and shall have and enjoy all such lands which shall descend, remain, or revert from any collateral ancestor of his said father, as if the attainder had not been had, saving to the king the lands in his hands, or of any other, by reason of the attainder. It seems that by these clauses, the intent of the king and parliament was to restore and enable him to have his petition of right as heir to his uncle. D. 274. pl. 40. Pasch. 10 Eliz. Anon.

15. If a man be attainted of treason or felony, though he be born in wedlock, he can be heir to no man, nor any man heir to him propter delictum; for that by his attainder his blood is corrupted, and this corruption of blood is so high, as it cannot absolutely be saved and restored but by act of parliament; for though the person attainted obtain his charter of pardon, yet that doth not make any to be heir, whose blood was corrupted at the time of the attainder, either downward or upward. Co. Litt. 8. a.

16. Of restitutions *by parliament*, some be *in blood only*, (that is, to make his resort as heir in blood to the party attainted, and other his ancestors, *and not to any dignity, inheritance of lands, &c.*) and this is a restitution *secundum quid*, or in part; and *some be general restitutions*, to blood, honours, dignities, inheritance, and all that was lost by the attainder; and that is *restitutio in integrum*, with an addition sometimes that it shall be lawful for the party restored, and his heirs, to enter, &c. Of the first you may read in Dier, 10 Eliz. fo. 274. in Petition; and Rot. Par. 23 Eliz. of the Earl of Arundel, &c. Of the 2d you may read 15 Ed. 3. tit. Petition, 2. 3 H. 7. fo. 15. a. 10 H. 7. 22, 23. Pl. Com. fo. 175. Rot. Par. 13 H. 4. Nu. 20. &c. Of both of them you may read plentifully in our books and parliament-rolls, and divers of them with addition of entry. See 1 H. 8. Kelw. 154. Sir Will. Odehal's case; 4 H. 7. 7. Lord Ormond's case; Rot. Parl. 11 H. 4. Nu. 42. Rich. de Hasting's case; and Rot. Parl. 14 Ed. 4. Nu. 4. Sir John Fortescue's case, attainted of treason in 1 E. 4. &c. 3 Inst. 240. cap. 106.

Hale's Hist. Pl. C. 358. cap. 27. S. P. and that a restitution in blood may be special and qualified; but that generally a restitution in blood is constituted liberally and extensively.—As where king H. 3. was intitled, &c. to the lands of William de Albo Monasterio by his attainder,

and granted the same to Robert de Mares and his heirs, *donec eas reddiderit rectis heredibus*, per voluntatem suam, vel per pacem. And albeit, at the making of this grant, William de Albo Monasterio, (being dead) could have, in respect of the attainder and corruption of blood, no right heir; yet because it was to make restitution, it had a most benign interpretation. 3 Inst. 241. cap. 106.

In restitutions the party is favoured, and not the king, and his prerogative has no exemption; per Dyer Ch. J. Pl. C. 252. a. Trin. 4 Eliz. in case of Willion v. Ld. Berkley.—3 Inst. 241. cap. 106. S. P.

17. If a person attainted is restored to his blood, this *does not restore his land*; for the attainder has 2 effects, viz. to corrupt the blood, and to give a forfeiture of all his estate both real and personal to the king. Jenk. 287. pl. 21. [277]

18. Upon reversal of attainders there is no restitution of money paid to the king, because the barons cannot in such case controul the treasury, and what is once paid into the treasury cannot be got out again; per Treby Ch. J. 5 Mod. 49. Trin. 7 W. 3. in case of the King v. Hornby.—Per Holt Ch. J. ibid. 61. S. P.

19. Restitution of blood, in its true nature and extent, can only be by act of parliament. Hale's Hist. Pl. C. 358.

20. *A. has issue B. a son, and is attainted of treason, and dies. B. purchases land in fee-simple. B. by parliament is restored only in blood*, and enabled as well to be heir to A. as to all other collateral lineal ancestors, provided it shall not restore B. to any of the lands of A. forfeited by the attainder. *B. dies without issue.* It was ruled that *the land of B. shall descend to the sisters of A. as aunts and collateral heirs of B.* 1st, Because the corruption of blood by the attainder is removed by the restitution. 2dly, Although the words of the act of restitution be to restore B. only as heir to A. &c. yet this doth not only remove the corruption of blood, and restore him and his lineal heirs in blood, but also his collateral heirs, and removes that impediment which would have hindered the descent to them. Hale's Hist. Pl. C. 258, 259. cites Co. P. C. cap. 106. Courtney's case.

And it is said that it had been sufficient if the act had restored and enabled him in blood only, as heir to his father; and that thereby he and his heirs, as well collateral as lineal, ought to make their de-

scend from A. (for there was the stop and corruption) and from all other the ancestors of the said B. lineal

lineal or collateral; and, ex abundanti, the other clause is added for the more manifestation thereof. *3 Inst.* 242. cap. 106.

For more of Blood Corrupted in general, see **Forfeitures**,
and other proper titles.

(A) Blunders.

It is a good
release to
one, and the
other words
are void.

Jenk. 198.

pl. 12. cites

9 E. 4. 42.

1. **I** F a man *releases to me all actions which I have against him*, where the intent may be to release all the actions which he had against me, yet it shall not be so taken against the express limitation; for *words make plea*. Otherwise of a *solvendum*. Arg. Roll. Rep. 367. cites 14 E. 4. 2.

14 E. 4. 2. D. 56. Kelw. 162. 174. Hob. 274.

2. Condition of a bond, that if *A. pay B. 20l. of lawful English money, which shall be in the year of our Lord 1599*, (the bond was made in 1593,) *in and upon the 13th day of October next ensuing the date hereof*, that then, &c. Adjudged that the payment was to be made in 1599, and not before. Cro. E. 420. Mich. 37 & 38. Eliz. B. R. Sharplus v. Hankinon.

Vern. 263.

pl. 257. S. C.

but S. P. does

not appear.

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3. *Bill of sale* of a ship by A. to B. was made *to A. the vendor*, to secure the payment of 400l. and so the vendor *sold to himself*; but relieved in equity. Fin. Rep. 206. Pasch. 27 Car. 2. De-gelder v. Depeister & Monday.

4. *Interpretatio fienda est ut res valeat*. Jenk. 198. pl. 12.

For more of Blunders in general, see **Mistake of Words**,
Consent, **Obligations** (M) (N), and other proper titles.

(A) Books and Authors.

1. 8 Ann. cap. 19. *THE* author of any book not yet printed, and his assigns, shall have the sole liberty of printing it for 14 years, to commence from the day of publishing thereof; and if any person, within the said time, shall print, reprint, or import any such book without the consent of such proprietor in writing, signed in the presence of 2 credible witnesses, or shall knowingly publish it without such consent, the offender shall forfeit the books and sheets to the proprietor, who shall forthwith damask and make them waste paper, and shall forfeit 1d. for every sheet found in his custody, either printed or printing, one moiety to the crown, the other to him who will sue in any court at Westminster.

2. S. 2. No bookseller, printer, or other person, shall be liable to these forfeitures by printing or reprinting any book without consent, unless the title to the copy of the book shall, before such publication, be entered in the register-book of the company of stationers, as usual, at the hall of the said company; and unless the consent of the proprietor be entered, paying 6d. for each entry, which register-book may at all seasonable times be inspected without fee; and the clerk of the company of stationers, when required, shall give a certificate of such entry; for which certificate he shall have 6d.

3. Bill to be quieted in the enjoyment of the right of sole printing Dr. Prideaux's book, called Directions to Churchwardens, and for a perpetual injunction against the defendant to prevent his printing and publishing the same. The plaintiffs claim the sole right of printing, by grant of the copy from the author, per stat. 8 Ann. fol. 261. The defendant claims a title under the original printer of the book, to whom the author first delivered the copy to be printed. Per Ld. C. Macclesfield, the bare delivery of the copy by the author to be printed, doth not divest the right of the copy out of the author; but is only an authority to the printer to print that edition, and the author may afterwards grant the right of the copy to another person. And a perpetual injunction was granted against the defendant not to print and publish the said book. MS. Rep. Mich. 9 Geo. Canc. Knaplock & Tonson v. Curle.

4. A bill was brought by the plaintiff as assignee of the copy of the Dunciad against the defendants, for an injunction to stay them from printing and selling the Dunciad, and to be quieted in the enjoyment of the sole printing of that book for 14 years, according to stat. 8 Ann. cap. 19. And upon filing the bill, and upon an affidavit that the plaintiff had purchased, or legally acquired the copy of that book, an injunction was granted nisi causa. It was shewed

shewed for cause, that the plaintiff had not set forth a good title to the sole printing of this book, either in the bill or in the affidavit upon which the injunction was granted; for he * only says that he has purchased or legally acquired the copy, *but does not say of the author, or who was the author*; and by the statute, the author, or the assignee of the author, are only intitled to the sole right of printing the book, and no other person; and it is not sufficient to say he purchased or legally acquired the copy, without saying he purchased it of the author. King C. allowed the cause, and dissolved the injunction. Trin. 2 Geo. 2. Gilliver v. Snaggs. Afterwards in the same term, an injunction was granted in the CASE OF GAY, author of the Sequel of the Beggar's Opera, against publishing and selling that book, upon a bill founded upon stat. 8 Ann. cap. 19.

For more of Books and Authors in general, see *Prerogative* (D. c. 2) and other proper titles.

(A) Bottomry-Bonds.

S. C. cited by Dode-ridge J. Cro. J. 508, 509. pl. 20. by the name of Dartmouth's case, where one went to Newfoundland, and another lent him 100 l. for a year, to victual his ship; and if he returned with the ship, he was to have so many 1000 of fish, and expressed at what rate, which exceeded the interest allowed by the statute; and if he did not return, then he should lose his principal; and adjudged no usury.

1. A Ship going in the *fishing-trade to Newfoundland*, (which voyage must be performed in 8 months,) the plaintiff gave the defendant 50 l. to repay 60 l. upon the return of the ship to Dartmouth; and if by leakage or tempest she should not return in 8 months, then to pay the principal money, viz. 50 l. only; and if she never returned, then he should pay nothing. All the court held that this is no usury within the statute; for if the ship had staid at Newfoundland 2 or 3 years, he was to pay but 60 l. upon the return of the ship, and if she never returned, then nothing; so as the plaintiff ran a hazard of having less than the interest which the law allows, and possibly neither principal nor interest. Cro. J. 208. pl. 3. Trin. 6 Jac. B. R. Sharpley v. Hurrell.

Lev. 54, 55. Hill. 13 & 14 Car. 2. B. R. Sayer v. Glean, S. C. resolved.

2. Debt upon bond of 300 l. conditioned that if such a ship failed to Surat in the East-Indies, and returned safe to London, or if the owner and his goods returned safe, &c. then the defendant should pay to the plaintiff the principal sum of 300 l. and also 40 l. for every

every 100l. But if the ship should perish by any unavoidable casualty of the sea, fire or enemies, to be proved by sufficient evidence, then the plaintiff was to have nothing. The question was, whether this was an usurious contract? Adjudged that it was not, and that it was a good bottomry contract; Bridgman Ch. J. *distinguished between a bargain and a loan*; for where the bargain is plain, and the principal is in hazard, it cannot be said within the statute of usury; but it is otherwise of a loan, where it is intended that the principal is in no hazard; and adjudged per tot. Cur. for the plaintiff, that this contract is not usurious. Sid. 27. pl. 8. Hill. 12 Car. 2. C. B. Soome v. Gleen.

ed a good bottomry-bond, and tolerable by the use of merchants, and allowable for the great perils of the sea; and judgment for the plaintiff.

3. Debt upon bond, conditioned to pay so much if the ship W. return within 6 months from Ostend to London, (which was more than the lawful interest of the money,) and if she did not return, &c. then the bond to be void. The defendant *pleaded*, that there was a *corrupt agreement* between him and the plaintiff, and that at the time of making the said bond, it was corruptly agreed between them, that the plaintiff should have no more than lawful interest in case the ship should ever return, and averred that the bond was entered into by covin, to evade the statute of usury and the penalty thereof; upon this averment the plaintiff took issue, and the defendant demurred, for that the plaintiff did not traverse the corrupt agreement, and that the averment is but the result thereof. Hale Ch. B. held clearly, that this bond is not within the statute; for it is the common way of insurance, and if this were void by the statute of usury, trade would be destroyed; and that it is not like the case where the condition of the bond is to pay so much money if such person be then living; for there is a certainty of that at the time, but it is altogether uncertain whether the ship shall ever return or not. But he agreed that the averment was well taken, because it discloses the manner of the agreement. And though the corrupt agreement might have been traversed, yet the averment is traversable too; and the demurrer to the replication naught. Hard. 418. pl. 4. Pasch. 17 Car. 2. in the Exchequer, Joy v. Kent.

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4. The plaintiff entered into a penal bond of bottomry to pay 40s. per month for 50l. *The ship was to sail from Holland to the Spanish islands, and so to return for England; if she perished, the plaintiff lost his 50l.* She went accordingly to the Spanish islands, took in Moors at Africk, and upon that occasion went to Barbadoes, and then perished at sea. The plaintiff being sued on the bond for the penalty, sought relief in chancery, pretending the deviation was on necessity; the bill was dismissed saving as to the penalty. 2 Chan. Cases, 130. Mich. 34 Car. 2. Anon.

5. The plaintiff was bound in consideration of 400l. as well to perform the voyage within 6 months, as at the 6 months end to pay the 400l. and 40l. premium, in case the vessel arrived safe, and was not lost in the voyage. It fell out that the plaintiff never went the voyage, whereby his bond became forfeited, and he now preferred his bill to be relieved; and upon a former hearing, in regard the ship lay all along in the port of London, and so the defendant run

no hazard of losing his principal, the Lord Keeper thought fit to decree, that the defendant should lose the premium of 40*l.* and be contented with his principal and ordinary interest; and now upon a re-hearing, he confirmed his former decree. Vern. 263. pl. 257. Mich. 1684. Deguilder v. Depeister.

6. The plaintiff lent 500*l.* upon the hull of a ship, and defendant covenanted to pay, if the ship went from London to Bantam, and returned from thence directly to London within 12 months, 550*l.* if from London to Bantam, and from thence to China or Formosa, and returned to London within 24 months, 650*l.* and if she returned not within 24 months, then to pay 5*l.* per month above 650*l.* till 36 months; and if she return not within 36 months, then to pay 710*l.* unless it can be proved by Wildy (the defendant) that the ship returned not, but was lost within 36 months. The ship went from London to Bantam, and from thence to Surat, and other parts, and so returned to Bantam; and in her voyage from Bantam to London was lost within 36 months, and the plaintiff hereupon brought debt upon the obligation; and this was the fact after long and intricate pleading, which appeared upon a demurrer. The court inclined, that by reason of the deviation, the party was well intitled to his money, &c. but *advise* vult; and afterwards Mich. 36 Car. 2. B. R. adjudged accordingly. Skin. 152. pl. 1. Hill. 35 & 36 Car. 2. B. R. Western v. Wildy.

7. Case on a bill of lading, on condition that the defendant shall deliver so much gold, the perils of the sea excepted. The defendant pleads piracy, to which the plaintiff demurs; per Cur. piracy is one of the dangers of the sea; and judgment for the defendant. Comb. 56, 57. Trin. 3 Jac. 2. B. R. Barton v. Wallisford.

8. A part-owner of a ship borrowed money of the plaintiff upon a bottomry-bond, payable on the return of the ship from the voyage she was then going on the service of the East-India company, and the East-India company broke up the ship in the Indies; and the owners brought their action against the company and recovered damages, but they did not amount to a full satisfaction; and the obligee brought his bill to have his proportionable satisfaction out of the money recovered; but his bill was dismissed, and he left to recover as well as he could at law; for a court of equity will never assist a bottomry-bond, which carries an unreasonable interest. Abr. Equ. Cases, 372. Mich. 1701. Dandy v. Turner.

9. Bill to be relieved against a bottomry-bond, &c. with condition that if the ship *Sufannah*, bound for the East-Indies, shall return to London within 36 months, or if the ship does not return within 36 months, not being taken or lost by inevitable accident within that time, then the money to be paid, &c. The ship was detained in port Surat in India by embargo by the Great Mogul, so that the ship could not sail from Surat till after the 36 months were elapsed, and in her return home was taken by the French; but being after the 36 months, the bond was forfeited; but there being no fault in the master, and the voyage delayed by inevitable accident, (viz.) by embargo by the Great Mogul, the bill prayed to be relieved against the penalty of the bond. Per Harcourt Ch. I cannot

cannot relieve in this case against the express agreement of the parties; but if the defendant had insured this money upon the ship, the plaintiff shall have the benefit of the insurance, upon allowing the defendant the charges of the insurance, if the plaintiff pays the money within 3 months; bill to be dismissed without costs. MS. Rep. Pasch. 12 Ann. in Canc. Ingledew v. Foster.

10. Hallhead had insured for Hutchinson and plaintiffs his assignees on the ship Eyles, with the company, and the entry in the company's book of the contract was in short items called a label, which was, viz. *at and from Fort St. George to London, lost or not lost.* And the policy was soon after made out and taken in the following words; "*that the adventure was to commence from the ship's departing from Fort St. George to London.*" And the case was, that before the insurance made the ship was lost in the river of Bengal, whither the ship had been sent from Fort St. George to refit. Bill was brought by plaintiffs to have the insurance money paid, being 500l. as a loss, &c. and founded the equity that the policy was not made agreeable to the label, according to which the risque is to commence from the ship's coming first to Fort St. George, and the going to Bengal to refit being a thing of necessity for performing the voyage, was *no deviation*, and the loss, being during that time, was within the intent of contract for the insuring. Lord Chancellor said, this is not proper to determine here. 1st, Question is as to the agreement. 2d, As to the breach; and doubted as to the agreement. The memorandum is not a printed form as to the material points, and the policy must be governed by that, if not varied. The words in the memorandum or label (at Fort St. George) includes the stay of the ship there, and the policy follows the words, but adds this, viz. the beginning of the adventure to be from the ship's departing from Fort St. George for London, which excludes the risque whilst the ship staid there; and this seems an inconsistency in the policy, first to describe the voyage, at and from, &c. and then to exclude the risque, at, &c. This seems a mistake in writing the policy, and is to be rectified as in the case of articles and a settlement; and decreed the words to be added in the policy, "*for the adventure to commence at and from Fort St. George.*" MS. Rep. Dec. 6, 1739. Motteux v. London Assurance. [282]

For more of Bottomry-Bonds in general, see *Policies of Insurance*, and other proper titles.

Bridges.

(A) Bridges. [*How repaired.*]

Cro. C. 365, 366. pl. 2. [1. COMMON bridges of right ought to be repaired by the inhabitants of the county, if it be not known who else ought to do it. Trin. 10 Car. in an information against the inhabitants of Middlesex for Longford bridge; agreed per Curiam. * 10 Ed. adjudged. S. C. cit. 3. 28.]

ed 11 Rep. 33. Pasch. 7 Jac. — By the common law the whole county, that is, the inhabitants of the county or shire, wherein the bridge is, shall repair the same; for of common right the whole county must repair it, because it is for the common good and ease of the whole county. 2 Inst. 701.

[2. If a man erects a mill for his single profit, and makes a new cut for the water to come thereto, and makes a new bridge over it, and the subjects used to go over it, as over a common bridge, this bridge ought to be repaired by him that hath the mill, and not by the county, because it was erected for his own benefit. 3 Ed. 2. B. R. adjudged for Bow-bridge and Channel-bridge, against the Prior of Stratford, and it is now repaired by London, who have the mill.]

S. P. for it is pro republica. Ibid. pl. 29. cites S. C.

3. It was presented that the abbot of T. ought to repair the bridge of T. who said, that at another time he traversed such presentment, where it was found that he ought to make but 2 arches in the middle; and per Knivet, it is no bridge without the residue, and it is not presented who made the rest, therefore the defendant shall make the whole if he can say no more, and he may make the bridge without the licence of those who have land adjoining. Br. Presentments in Courts, pl. 22. cites 43 Aff. 37.

4. If a prior and his predecessor, time out of mind, have made a bridge of alms, they shall be bound to repair it for ever. Br. Nufance, pl. 5. cites 44 E. 3. 31. Per Knivet Ch. J.

Br. Nufance, pl. 23. cites S. C.

5. He who has land adjoining to a bridge, is not bound of common right to repair it, though the bridge has been there time out of mind, unless he has done so by prescription, and those whose estate he has, &c. Mich. 8 H. 7. 5. b. pl. 2.

6. At the common law some persons, spiritual or temporal, incorporate or not incorporate, are bound to repair bridges *ratione tenuræ sue, terrarum sive tenementorum*, &c. some *ratione prescriptionis tantum, ratione tenuræ*, by reason that they, and those whose estate they have in the lands or tenements, are bound in respect thereof to repair the same; but they which have lands on the one side of the

the bridge, or on the other, or both, are not bound of common right to repair the same. 2 Inst. 700.

7. But as to *ratione prescriptionis tantum*, there is a diversity between bodies politic or corporate, spiritual or temporal, and natural persons; for bodies politic or corporate, spiritual or temporal, may be bound by usage and prescription only, because they are local, and have a succession perpetual; but a natural person cannot be bound by act of his ancestor, without a lien, or binding, and assets. 2 Inst. 700.

8. If a bridge be within a franchise, those of the franchise are to repair it. If the bridge be part within a franchise, and part within the guildable, so much as in the franchise shall be repaired by those of the franchise, and so much as is within the guildable shall be repaired by those of the guildable, and so it is if it be in 2 counties, mutatis mutandis. 2 Inst. 701.

9. If a man makes a bridge for the common good of all the subjects, he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but *ratione tenuræ*, or *prescriptionis*. 2 Inst. 701.

10. If a man who holds 100 acres of land, ought by his tenure thereof to repair such bridge, if he aliens in fee 20 acres to one, and 20 acres to another, and one of them only be distrained to make the reparations upon a presentment found, he shall have a special writ to the king's officers, that they do not distrain him, but according to the rate of his proportion of the land which he holds. F. N. B. 235. (B.)

Pl. C. 129.
b. S. C.
cited by
Saunders J.

11. The king seized of a manor, repaired a bridge as lord thereof, and then granted the manor to H. who sold several parts of the land to several persons, and afterwards H. was indicted for not repairing the bridge, and thereupon he desired to have contribution of those who had purchased from him, and then he said he would repair it. But it was answered, that the court might force the repair upon him alone, or upon any other in whose hands any of the lands appeared to be which was chargeable to the repair thereof, and they are to seek their remedy at law for contribution from the rest, and this court is not to let the bridge lay in decay till the dispute between them about contribution is determined. Jo. 273. 8 Car. in Itinere Windsor. The case of Loddon bridge.

12. Where a lord of a manor was chargeable with the repair of a bridge *ratione tenuræ*, the ancient freehold and copyhold tenants are not liable to contribute, because nothing is part of the manor but the demesnes and services, and not the lands of the tenants; and though the copyholders were enfranchised, yet they are not chargeable; for the enfranchisement only alters the manner of their tenure; but all who have any part of the demesne lands by purchase are liable; and if cesty que trust of the demesnes in possession or reversion be named, that is sufficient in a court of equity, without making the tenants of the land, or them in reversion, parties. Hard. 131. pl. 4. Mich. 1658. in the Exchequer, Rich v. Barker.

13. *Corporations are rateable with the county towards the repairs of public bridges; per Withens and Wright Ch. J. Herbert absente, and Holloway doubting. Skin. 254. pl. 2. Mich. 2 Jac. 2. B. R. County of Worcester and Town of Evesholm.*

14. *The inhabitants of a county cannot of their own authority change a bridge or highway from one place to another; for it cannot be without act of parliament. 6 Mod. 307. Mich. 3 Ann. B. R. in case of the Queen v. the County of Wilts.*

[284] 15. 14 Geo. 2. cap. 33. *The justices of peace in any county, city, &c. at their general sessions, or general quarter sessions, or the major part, may purchase or agree with any persons, or bodies politic, for any piece of land joining, or near any county bridge within their several limits, for enlarging, or more convenient re-building the same, which pieces of land shall not exceed one acre in the whole for any such bridge, and shall be paid for out of the money raised by virtue of an act made 12 Geo. 2. cap. 29. intitled, an act for the more easy assessing, collecting, and levying of county rates; the treasurers being authorized by orders under the hands and seals of justices at their general or quarter sessions, which lands shall be conveyed to such persons as the said justices shall appoint in trust, for enlarging or rebuilding such bridges.*

(B) Actions, Indictments, and Informations. In what Cases; and Pleadings.

Br. Nufance, 1. *I* **T** was presented that E. and A. ought, and used to repair the bridge of W. which is broke, to the nufance, &c. and it was said, that the presentment is not sufficient; for it is not said that they are tenants of any land by reason of which they ought to do it, and they are not charged by their persons, and after they said that they did not do it but once of alms, absque hoc that they ought and used to do it, &c. Br. Prescription, pl. 49. cites 27 Aff. 8.

2. In case, plaintiff declared, that the defendant ought to repair a bridge over such a water, by which bridge the plaintiff, and those whose estate he has in a manor, by reason of the manor, had used to pass with carriage necessary, &c. which bridge was not repaired, &c. and held a good title enough for the plaintiff, without saying that he had the way to any franktenement, or other place certain. Thel. Dig. 106. lib. 10. cap. 14. f. 14. cites Trin. 11 H. 4. 82.

This extends only to common bridges in the king's highways, where all the king's liege people have, or may have, passage, and not to private bridges to mills, or the like; and therefore the indictment upon this statute *(quod pons publicus & communis situs in alta regia via super flumen, seu cursum aquæ, &c. 2 Inst. 701.*

3. 22 H. 8. cap. 5. f. 1. *The justices of peace in every shire, franchise, city or borough, or four of them, (quor' un') are impowered at their general sessions, to enquire of, and determine all annoyances of bridges broken in the highways, and to make such process and pains upon every presentment before them, for reformation of the same, against such as ought to be charged to the amending the said bridges, as they shall see fit.*

In every shire is to be understood, reddendo singula singulis, that is to say, 1st, In every shire or county where there be 4 or more justices of the peace, whereof one or more is of the quorum. 2dly, Franchise, where be 4 or more justices of the peace; and one or more of the quorum. 3dly, City, where there be 4 or more justices of the peace, and one or more of the quorum. 4thly, Borough, where there be 4 or more justices of the peace, and one or more of the quorum, and where they keep general sessions of the peace for such franchises, cities, or boroughs, but for want thereof, the justices of peace of the county shall enquire; but if the franchise, city, or borough, be a county of itself, and have not 4 or more justices of the peace, whereof one or more is of the quorum, no other justices of peace, of any other shire or county, have any power by this act to enquire of, hear and determine the decay of bridges there, but such decay must be reformed by such remedies (before specified) as the common law did give; therefore it was necessary to be known what the common law was before the making of this statute. And such process they are to make upon every presentment before them, for reformation of the same, against such as own to be charged for the making or amending such bridges, as the justices of his majesty's bench use commonly to do, or it shall seem by their discretions to be necessary and convenient for the speedy amendment of such bridges. 2 Inst. 701, 702.

4. S. 2 & 3. *Where it cannot be known what hundred, town, parish, or person, ought to repair such bridges, if they be not in a city or town corporate, they * shall be repaired by the † inhabitants of the shire or riding where such bridges be; and if part of such bridge happen to be in one shire, and the other part in another shire, or in some city, or town corporate, that then the respective shires, cities, or towns corporate, shall repair such part of such bridges as lie within their several limits.*

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† See tit. Inhabitants (A) pl. 1. and the notes there, who shall be said to be inhabitants within this statute. — It hath been gravely advised,

that for the better warrant of these 4 justices of peace, inquiry should be made by the great inquest for the body of the county, at the general quarter sessions, who ought to repair it; and if that cannot appear upon any proof made, then a presentment to be made, that the bridge is in decay; and to conclude, et ulterius juratores prædicti præsentant, quod prius nescitur quæ personæ, quæ terræ, five tenementa, aut corpora politica eundem pontem, aut aliquam inde parcellam ex jure, aut antiqua consuetudine reparare debent, aut consueverunt; and, by this means, the 4 or more justices of peace, being judges of record, shall be informed of record, that it cannot be known or proved, &c. 2 Inst. 703.

As to persons who of right ought to repair bridges, the act of 22 H. 8. was only declaratory of the common law; per Powell J. which Holt Ch. J. agreed, and said, that the charge of repairing bridges was incumbent on the county by common law, unless where particular persons were charged with it by tenor or prescription; what was new in it, was the appointing the method of doing it, that a hundred might be charged with the repair of a bridge by prescription. 2 Ld. Raym. Rep. 1251. Pasch. 5 Ann. in case of the Queen v. the Justices of the Peace of the Liberty of St. Peter's in York.

5. S. 4. *And where it cannot be known what persons, lands, &c. ought to repair such bridges, the justices of peace within the shires or ridings, &c. and the justices of peace within every city or town corporate, or 4 of the justices at the least, whereof one to be of the quorum, shall call before them the constables of every town, &c. being within the shire, &c. wherein such bridges, or any parcel thereof shall happen to be, or else two of the most honest inhabitants within every such town, &c. by the discretion of the said justices of peace, or 4 of them at the least, whereof one to be of the quorum;*

The first thing the justices are to do when they are assembled, is to call the constables, &c. if they be present (as commonly they are) at the

general sessions of peace, or else to make warrants to call them before them, at a certain day and place, and in those warrants to signify that it is for a taxation of inhabitants of the whole county, for a reparation of such a bridge. 2 Inst. 703. Marg.

6. *And the said justices of peace, or 4 of them, whereof one to be of the quorum, with the assent of the said constables or inhabitants, shall have power to tax every inhabitant within the limits of their commissions, for the repairing of such bridges.*

So as neither the justices, without such assent, nor the constables

or inhabitants without the justices, can make any taxation by this act.

2 Inst. 704. By

By these words (every inhabitant) all privileges of exemptions or discharges whatsoever from contributions for the reparation of decayed bridges, (if any were,) are taken away, although the exemption were by act of parliament; and every one may be taxed by himself, and each one bear his burthen; and the taxation cannot be set upon the hundred, parish, town, &c. for then one, or a few, might be distrained for the whole. 2 Inst. 704. — S. P. resolved, 2 Ld. Raym. Rep. 1250, Pasch. 5 Ann. in case of the Queen v. the Justices of Peace of the Liberty of St. Peter's in York.

Hereby 4 things are to be observed, 1st, (As hath been said) that the taxation must be several. 2dly, That the remedy for levying is by distress in his lands, goods, and chattels in any place within that hundred, and to sell such distress; and this the collectors of that hundred may do by force of this act. 3dly, That if upon demand the sum be not paid, albeit the inhabitant do not expressly refuse, it is a refusal in law. 4thly, Albeit 2 collectors be appointed, yet one of them by the command and consent of the other may distrain and sell; for this is the distress and sale of them. 2 Inst. 704, 705.

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And by 1 Ann. stat. 1. cap. 12. §. 6. the Justices shall have power to allow persons concerned in the execution of this act, 3d. in the pound.

8. S. 8. The justices of peace shall have power to allow such reasonable charges to the surveyors and collectors as shall be thought convenient.

9. If a bridge be a private bridge, as to a mill which A. was bound to maintain, over which B. had a passage, &c. if the bridge was in decay, B. might have his writ de ponte reparando; but if the bridge was for the public, &c. the remedy was by presentment at the suit of the king, for avoiding multiplicity of suits, 2 Inst. 701.

10. This presentment might be at the common law before the justices of B. R. or before justices in eyre, or commissioners of oyer and terminer, or before the sheriff by commission, or writ in nature of a commission; but as to the sheriff, his power to take indictments by force of any such commission, or writ in the nature of a commission, is taken away by the statute 28 E. 3. cap. 9. but it may be presented in the turn or left. 2 Inst. 701.

11. If I have a passage over a bridge, and another ought to repair the bridge, and he suffers the same to fall to decay, I shall have a writ against him. F, N, B, 127. (D).

12. If any bridge, wall, or sewer be broken, unto the annoyance of the country, upon a surmise made by any person thereof in chancery, that certain persons ought to repair the same, he shall have a writ unto the sheriff to distrain such persons to repair the same; but it appears by the Register, that the king shall send his commission to the sheriff to inquire who ought to make such bridges, and that he distrain them to make the same, and repair it; but by the statute of 28 E. 3. cap. 9. a commission shall not be made unto the sheriff to take an indictment, and the king may send unto the sheriff to distrain those persons who ought to make or repair

repair such a way, or causeway, or pavement, and upon it an alias & pluries if it be not done, and an attachment upon the same; and if the bridge or way be in the confines of the county, he shall have several writs unto every sheriff to distrain them in their bailiwicks, that they with the men in other counties shall make and repair the bridges and ways, &c. F. N. B. 127. (E).

13. Indictment was *debet & solent reparare pontem, &c.* It was moved that the indictment was insufficient, because it is *not alledged* in the indictment that the bridge was over a water, and no [so not] needful that it be amended; 2dly, it did not appear in the indictment that at the time of the indictment the said bridge was ruinous and decayed; 3dly, the indictment is, that B. and N. *debet & solent reparare pontem*, and it is *not shewed* that their charge of repairing of the same is *ratione tenuræ*, cites 21 E. 4. 38. where it is said that a prescription cannot be that a common person ought to repair a bridge, unless it be said to be by reason of his tenure; but it is otherwise in case of a corporation; and for these errors the indictment was quashed by judgment of the court. Godb. 346, 347. pl. 441. Trin. 21 Jac. B. R. Bridges v. Nichols.

14. Indictment for not repairing a bridge did *not set forth in what county* the bridge lies, and for that exception it was quashed. Sty. 108. Trin. 24 Car. B. R. The King v. Sir Henry Spiller.

15. Another indictment was for not repairing of May's bridge, and it doth *not shew that the bridge is in the highway*; but to this Roll Ch. J. said, that the indictment doth say it is a *common bridge*, and that is enough, and it is needless to say it is in the highway. Sty. 108. Trin. 24 Car. B. R. The King v. Sir Henry Spiller.

16. Another exception was taken, that it did *not shew whether the bridge was a cart-bridge, or a horse-bridge, or a foot-bridge*, or what other passage was over it; and for that exception that indictment was quashed. Sty. 108. Trin. 24 Car. B. R. The King v. Sir Henry Spiller. [287]

17. To a 3d indictment for not repairing the same bridge, this exception was taken, viz. It says that Sir H. S. was bound to repair the bridge *ratione manerii*, which cannot be good; but it should be *ratione tenuræ manerii*. Roll Ch. J. said it ought to shew that he is owner of the manor, and although it do express that he is bound to repair *ratione manerii sui*, that is but implication that he is to repair, and makes it not appear that he is possessed of the manor, and upon this exception was this indictment quashed. Sty. 108, 109. Trin. 24 Car. B. R. The King v. Sir Henry Spiller.

18. To a 4th indictment for not repairing the same bridge, this exception was taken, that there is *no addition of the county where Sir H. S. dwelt*, as the statute directs, and for this it was also quashed. Sty. 108, 109. Trin. 24 Car. B. R. The King v. Spiller.

19. By 22 Car. 2. cap. 12. s. 4. *All defects of repairs of bridges, &c. shall be presented in the county, and no such presentment or indictment*

See infra 5
& 6 W. &
M. cap. 11.
s. 5.

ment shall be removed by certiorari or otherwise out of the county, till such presentment or indictment be traversed, and judgment given thereupon.

The reporter adds a note, that the defendants did not plead not guilty, but that another ought to repair, and traversed that themselves ought, as Hale Ch. J. held they ought in this case of a bridge to do,

so that if they ought not to do it, it might appear to the court who else ought. 2dly, Note a traverse upon a traverse, and the issue joined upon the last traverse who ought to repair it; and yet the defendants were found guilty upon this issue, joining it to the first traverse that they ought not to repair, and all this by direction of Hale Ch. J. the rest of the justices consenting. Ibid.—3 Keb. 370. pl. 59. S. C. says that verdict was for the King against L.

20. Information against the inhabitants of the county of N. for not repairing a bridge, which, time out of mind, they have and ought to repair. *Two of the inhabitants, in the name of themselves and of the rest, plead that L. and other persons, owners of lands called bridgelands, ought to repair ratione tenuræ, and traverse that the inhabitants had and ought, &c.* The attorney-general replied that the inhabitants ought, and traversed that L., &c. ought. The defendants rejoined that L., &c. ought; upon which they were at issue; and ex assensu partium, it was tried at bar by a Middlesex jury by consent, and the defendants were found guilty. 2 Lev. 112. Trin. 26 Car. 2. B. R. The King v. the Inhabitants of Nottingham.

21. If a bridge be out of repair, the justices cannot set rates upon the persons that are to repair it; but they must consent to it themselves. 2 Mod. 8. Hill. 26 & 27 Car. 2. C. B. obiter, in case of Curtis v. Davenant.

22. A. and others were indicted for not repairing of a bridge, which it was alleged they were bound to repair, *ratione tenuræ* of such lands. A. pleaded, that he was not bound to repair, *ratione tenuræ*, and found that he was. In arrest of judgment it was said, that the verdict was not pursuant to the indictment; for therein it is alleged, that A. and others were bound to repair *ratione tenuræ*, and the verdict is, that A. *ratione tenuræ, &c. reparare debet partem prædictæ modo & forma, prout per indictmentum prædictum supponitur*; sed non allocatur; for each of them may be bound to repair for their respective lands, and they must get contribution by the writ *de onerand' pro rata portione*. 2dly, It was said, that it is *ratione tenuræ*, and not said *sua*, and this was said to be naught, and Noy, 93. was cited; sed non allocatur; for the precedents are generally so. Vent. 331. Trin. 30 Car. 2. B. R. The King v. Sir Tho. Fanshaw.

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23. Information against the inhabitants of Essex for not repairing a stone bridge, called D. bridge, in the several parishes of H. and D. The defendants plead, that they ought not to be charged, &c. for that by an inquisition taken at Chelmsford, August the 3d, 26 Car. 2. before Sir M. H. and T. and others, justices of oyer and terminer, it was presented, that a certain bridge, commonly called D. bridge, lying, &c. in parochia de D., &c. was then in decay, and that Sir T. F. ought to repair it *ratione tenuræ*; who pleaded, that he ought not to repair the said bridge *ratione tenuræ*, but that the inhabitants of D. ought to repair it; upon which a trial was had, and the jury found that Sir T. ought to repair it, and judgment against him; and the defendants aver the bridge to be the same, and that the

the judgment was still in force; and upon demurrer it was objected, that the bridge laid in the information was in two parishes, (viz.) in H. and D. but the bridge in the defendant's plea was only in D. so it could not be the same bridge; for Sir T. F. may be obliged to repair so much of the bridge as was in D. and the county the other part, which lies in H. and judgment was given for the king. Raym. 384. Trin. 32 Car. 2. B. R. The King v. Inhabitants of Essex.

24. In an indictment (for not repairing a bridge) against the county, one of the county may be a *witness*. Arg. and per Dolben J. it was so in the case of Peterborough Bridge. Vent. 351. Mich. 32 Car. 2. B. R.

25. 5 & 6 W. & M. cap. 11. s. 6. *If any indictment be against any person for not repairing bridges, &c. and the title to repair the same may come in question, upon such suggestion, and affidavit made thereof, a certiorari may be granted to remove the same into B. R. provided that the parties prosecuting such certiorari shall find 2 manucaptors to be bound in a recognizance, with condition to try it at the next assizes, &c.*

26. Indictment against defendant for not repairing of a certain bridge, &c. which he was bound to repair, eo quod he was *dominus manerii de la More*. Holt Ch. J. said, that a man is not bound to repair a bridge because he has a manor, or is lord of a manor; but it must be said, that this is some charge upon the manor that can oblige the man to repair, and that only can be one of the two ways; 1st, That he held the manor by the service of repairing the bridge, &c. that is, *ratione tenuræ*, and this being a charge upon the possession, is like any other service for which the tenant in possession is chargeable. Every tenant in possession, be he but tenant for years, or at will, is bound to repair, and immediately, upon default of repair, he is indictable. 2dly, The other way of charge is *by prescription*, and then it must be the tertenant, and all those, whose estate he has, did use, and were bound to repair, and here you neither shew tenure or prescription; but as to charge to repair a bridge, it will be well to say, that *omnes occupatores, &c.* But where one goes to charge the estate of another with any thing for his own benefit, he *must either say, that he and all those whose estate, &c. or at least omnes terr' tenentes*; and here judgment was staid; per Cur. 7 Mod. 54. Mich. 1 Ann. B. R. The Queen v. Bucknell.

He was lord of the manor of Le More in Hertfordshire, which manor was held by the service of repairing a public bridge, and though all the demesnes of the manor, except the copyholds, were aliened, yet it was held per Cur. that all the alienees were chargeable in proportion, yet the queen might charge any of them with the whole,

and let him have contribution against the others; and though the lord had nothing but the copyhold, yet so much as the freehold thereof was in him, he was chargeable, and the court would direct the information to be against all the parties liable, but let him that is charged have his remedy against the rest; per Cur. 7 Mod. 98. Mich. 1 Ann. B. R. The Queen v. Bucknal. — 2 Ld. Raym. 792. Trin. 1 Ann. S. C. says, this cause was tried at Hertford summer assizes, 1 Ann. before Holt Ch. J. who then held, that a prescription that the lords of the manor ought to repair the bridge, without saying *ratione tenuræ*, or *ratione terræ*, was good, because (by him) the manor might have been granted to be held by the service of repairing this bridge before the statute of quia emptores terrarum; or the king may make such grant at this day, he not being bound by the said statute; and in pleading one may say that he is obliged as lord of the manor; but indeed, it is by reason of the demesnes of the manor, and therefore if part of the demesnes are granted to J. S. he will be obliged to contribute to the repairs, but the information or indictment may be against any of them, and though it appears upon the evidence that another is obliged also, yet the defendant must be convicted; and so he was, though he proved upon the evidence that others were obliged to repair as well as himself. — Ibid. 804. Mich. 1 Ann. S. C. and Holt Ch. J. *mutata opinione* said, that though the defendant was lord of the manor, yet that

that was no reason that he should repair the bridge, but that some particular charge ought to be shewn, as *ratione tenuræ*, or by prescription. And that in such case, where a man is obliged to repair a bridge, his tenant for years, being * in possession, will be obliged to do it, and if he fails he will be indictable for it, and all the other judges being of the same opinion, the judgment was arrested.

25. 1 Ann. sess. 1. cap. 18. s. 2. *The justices of peace shall, at their quarter sessions, have power, upon presentment that any bridge is out of repair, which by them ought to be repaired, to assess upon every place within their commissions, as they usually have been assessed towards the repair of bridges, which money shall be collected by the constables, or such persons as the sessions shall appoint.*

26. S. 3. *Persons neglecting to assess, collect, or pay the money, shall forfeit 40s. and every treasurer that shall pay money, except by order of sessions, shall forfeit 5l.*

27. S. 4. *No fine for not repairing such bridges and highways shall be returned into the exchequer, but shall be paid to the treasurer, and applied by the said justices towards the building or repairing of such bridges and highways.*

28. S. 5. *All matters concerning repairing such bridges and highways shall be determined in the county, and not removed by certiorari.*

29. S. 7. *Persons authorised by this act may plead the general issue, and give this act, and the 22 H. 8. cap. 5. in evidence, and if judgment be for them, they shall have double costs.*

30. S. 8. *This act shall not discharge particular persons, estates or places from reparation.*

31. S. 9. *All penalties upon this act shall be applied to repairing the said bridges and highways.*

32. S. 11. *Cardiffe bridge shall be reputed a common bridge, and be repaired by the county of Glamorgan.*

33. S. 13. *In all informations or indictments, the evidence of the inhabitants of the town or county in which decayed bridges or highways lie, shall be admitted.*

34. W. who was only a tenant at will, was indicted for permitting the house in his possession, adjoining to a common bridge, and which he ought to repair *ratione tenuræ*, to be so much out of repair, that it was ready to fall on the queen's subjects passing over the said bridge, &c. It was adjudged on a special verdict, that he ought to repair the house so that the public be not prejudiced by the want thereof, though he is not compellable to repair as to his landlord; the only objection is, that he is not chargeable to repair *ratione tenuræ*; but though that is improper, yet it shall be intended of the possession, and not of a service, and judgment was given against the defendant. 2 Ld. Raym. Rep. 856. Pasch. 2 Ann. *The Queen v. Watfon.*

35. In an information for suffering a common bridge to be ruinous, which the defendants by tenure were bound to repair, it was resolved, 1st, That if a manor be held by the service or tenure of repairing a common bridge or highway, and that manor afterwards comes to be divided into several hands, every one of these alienees, being tenants of any parcel, either of the demesnes or services, shall be liable to the whole charge, and are contributory among themselves; and though the lord of the manor had, upon the several alienations,

nations, agreed to discharge those, that purchased of him, as he might, of such repairs, yet that shall not alter the remedy for the public, but only bind the lord and those that claim under him; as the whole manor, and every part of it in the possession of one tenant, was once chargeable with the reparation, so it shall remain notwithstanding any act of the proprietor; it shall not be in his power to apportion the charge whereby the remedy for public benefit should be made more difficult, or by alienations to persons unable to render it, in respect of the parts which should come into such hands, quite frustrate. 2dly, That though a manor, subject to such charge, comes into the hands of the crown, yet the duty upon it continues, and any person claiming afterwards under the crown the whole manor, or any part of it, shall be liable to an indictment or information for want of due repairs. 1 Salk. 358. pl. 5. Pasch. 3 Ann. B. R. The Queen v. Bucklugh (Dutchess of).

36. The county of W. was indicted for not repairing Laycock-bridge. They pleaded that the village of Laycock ought to repair it. It was proved in evidence, that the justices at the sessions had made an order upon the village to repair it; but the court held that that was no evidence; for the justices might indict, but could not make an order, and the county is liable, unless they can find a particular person to charge. 1 Salk. 359. pl. 7. Mich. 3 Ann. B. R. The Queen v. the Inhabitants of the County of Wilts.

37. Indictment was for not repairing *quendam communem pontem situm in quadam communi semita pedestri*, &c. Per Holt Ch. J. the word *communis* does not, *ex vi termini*, import that it is common to all the queen's subjects, as it ought to do to maintain an indictment. The word *publicus*, mentioned in a precedent produced, is of wider extent than *communis*; and it will be hard to understand the word *communis* to be universal to charge a man's freehold; nor will the conclusion of *ad nocumentum omnium ligeorum domini regis illic transeunt* help it, if so much be not expressly charged in the premises; and not being said to whom it is common, it is very fit to see precedents before we determine it. 6 Mod. 255, 256, Mich. 3 Ann. B. R. The Queen v. Saintiff.

communis semita. It was objected that the 22 H. 8. by which justices of peace have their jurisdiction of nuisances in bridges, extends only to bridges in the common highway; and likewise that it ought to shew the quantity, viz. so many foot in length, and so many in breadth. It was answered that there may be *communis strata*, which is not the king's highway, and yet the justices have power over nuisances in that case, not by virtue of the 22 H. 8. but by the 1 E. 3. which gives power of all nuisances. The court doubted as to the 1st exception, and over-ruled the 2d, it being said *dimidium*; but held that *pons pedalis* did not signify a foot-bridge, but a bridge a foot long; and so reversed the judgment, being *pedalis* for *pedestris*.—2 Ld. Raym. Rep. 1174. S. C. adjudged, and the former judgment reversed according to 1 Salk.

38. The court was moved for a *mandamus* to the justices of peace for the county of Wilts, to make an assessment upon the inhabitants of an hundred in the county for the reimbursing 2 of the inhabitants of that hundred, who, upon an indictment against the inhabitants of that hundred for not repairing a bridge within the said hundred, were distrained to appear and defend the said indictment, and upon that account were near 30l. out of pocket.

The

The court refused to grant a mandamus, because the justices had not a power to make an assessment for that purpose, and said it was an hard case; but that no remedy was provided therein. MS. Cases, 67. Mich. 4 Geo. B. R. The Justices of Peace of Wiltshire.

39. Upon a motion made to discharge a rule for an *information against the inhabitants of the county* for not repairing a bridge, it was *alleged that the parishioners of Mitcham* in that county *ought to repair it, which they had done time out of mind*. It is true that parish had obtained a verdict against that county, but it was by surprise; for by certificates and other records of the sessions, it will appear that this parish ought to repair this bridge, and that they had been fined for not repairing, and that they had acquiesced under that charge many years. It was *insisted for the parish, that admitting they had repaired this bridge, yet if they were not obliged so to do, either by prescription or tenure, they shall not always be liable*. They cannot be obliged by prescription, because the inhabitants of this parish are not a body politic, and it is not pretended that they are obliged by tenure; to which it was answered, that an *information against the county in general, was the only way to try the right*; for though this parish might not be obliged to repair the bridge, yet some other parish might; and since the county is *prima facie* to repair it, it is probable that when the information is exhibited against them, the inhabitants of Mitcham to excuse themselves may shew who is obliged to repair; and the court being of that opinion, the rule was made absolute. 8 Mod. 119, 120. Hill. 9 Geo. The King v. the Inhabitants of the County of Surry.

For more of Bridges in general, see other proper titles.

Bringing Money into Court.

(A) In what Cases, and at what Time. And Pleadings.

1. *DEBT* upon bond. The defendant pleaded a tender at the day, and *tout temps prist*. The plaintiff received the principal sum in court, and judgment to acquit the defendant of the sum received; but the plaintiff, to have damages, alleged a demand; to which the defendant demurred, and had judgment; for if the plaintiff would have damages, he ought not to have received the money out of court; for after a judgment, *quod eat inde sine die*, no issue shall be taken. Cro. J. 126. pl. 13. Trin. 4 Jac. B. R. Harrold v. Clotworthy.

S. C. cited by Holt Ch. J. Ld. Raym. Rep. 647. in case of *HORN v. LEWIN*, and therefore where a defendant pleads *tout temps prist*, and brings

the money into court, and concludes with a prayer of judgment as to the damages, if the plaintiff takes the money out of court, he must agree to all that the defendant has said, otherwise he ought not to take the money out of court; for a man cannot proceed for damages after he has barred himself from the having judgment for the principal, where the damages are merely accessory, except in the case of ejectment, where the term expires pending the suit; but as to this point the other three judges seemed to doubt, and they gave no opinion, but rather inclined to be of opinion that the avowry [which was the case there] was not abated by this taking of the money out of court. — 2 Ld. Raym. Rep. 774. Trin. 1 Ann. in the case of *BURTON v. SOUTER*, in assumpsit, it was insisted, as in the case of *Horne v. Lewin* (before), that after accepting the money the plaintiff could not proceed for damages, and there Holt Ch. J. held strongly his former opinion.

2. In an *avowry* by the bailiff of A. for a *rent-charge*, the defendant had judgment, and now A. desired to try the right; but the court would not grant it without bringing the money recovered into court, and agree to bring no 2d deliverance to procrastinate the cause by Withernam, &c. Keb. 742. pl. 29. Trin. 16 Car. 2. B. R. Searl v. Taylor.

3. In an action upon the case for 3 *hogsheds of vinegar and a rundlet*, Jones prayed that he might deliver money for the rundlet, as was agreed, or as the secondary should tax, and that the plaintiff might go on for the rest; and the court ordered the plaintiff to shew cause why the rundlet should not be struck out, or he go on for the rest at his peril; so where the cause of action is really small, in comparison to the declaration. 2 Keb. 420. pl. 49. Mich. 20 Car. 2. B. R. Brown v. Welmes.

4. Money

Bringing Money into Court.

4. Money brought into court, in order to get an *injunction* against a judgment on a bond given by a mother to her son, (an infant, and whom she and her after husband had maintained for several years, and had paid a considerable part of the money,) *was delivered back again*, on giving *security* to pay what should appear due for principal and interest, and satisfaction decreed to be acknowledged thereupon on the record of the judgment. Fin. Rep. 1. Mich. 25 Car. 2. Cook v. New.

5. A. *devised lands* to B. subject to a *proviso for payment* of 2000l. to defendants within 3 years after A.'s death. B. brought the money into court. Decreed that the lands be *discharged*, and that the defendants be at liberty to take the money out of court. Fin. Rep. 61. Hill. 25 Car. 2. Ld. Willoughby v. Dixie.

6. *Portion* and interest *devised on a contingency* of dying before 21, and unmarried, decreed to be paid into court for the benefit of a *hæres factus*, according to the will, in case of the devisee's death. 2 Chan. Rep. 150. 30 Car. 2. Bourne v. Tynt.

7. In *covenant* the plaintiff declared upon *several breaches*, one whereof was for *not paying* 7l. according to the covenant, it was moved for the defendant that he might be admitted to bring 7l. into court, together with his costs hitherto, &c. and that the plaintiff *might proceed for the rest if he thought fit*; but the motion was denied, because the plaintiff had declared of other breaches, and the matter lay in damages. Vent. 356. Mich. 33 Car. 2. B. R. Anon.

upon bringing in 10 l. into court, it might be struck out of the declaration; but the court denied it; for when it appears the plaintiff has *just cause of action for one thing*, they will not put him to try the rest at peril of costs. 12 Mod. 95. Trin. 8 W. 3. Pawlet v. Hestheld.

Northey moved to bring money into court upon a covenant, and was refused. 12 Mod. 247. Mich. 10 W. 3. Lawly v. Dibble.——In covenant for *payment of money*, Powell J. said, that the court had granted it; but that in covenant for *repairs* they have denied it. 11 Mod. 270. pl. 12. Hill. 8 Ann. B. R. Anon.——In covenant for non-payment of rent, the practice is to allow the bringing money into court. Barnes's Notes in C. B. 198. Mich. 2 Geo. 2. in a note.

Rule of bringing money into court was denied in *covenant*; otherwise if *debt* had been brought upon the *charter party*. Cumb. 138. Mich. 1 W. & M. in B. R. Anon.

8. A *scire facias* had *issued out against the tenants on a judgment*, and they had *pleaded ne unques seise*, and *issue found against them*, and judgment for the plaintiff. It was *moved that the elegit might be stopped on bringing the money into court*; for if the elegit were taken out and the lands extended, we might have the lands discharged by *scire facias*, and bringing the money into court; and it was granted. The like motion was lately granted in C. B. Comb. 169. Mich. 1 W. & M. in B. R. Anon.

9. In *ejectment* for non-payment of rent, the court denied to stop the ejectment on bringing in the arrears. Cumb. 255. Pasch. 6 W. & M. in B. R. Harding v. Brook.

a Salk. 597. in pl. 3. cites Mich. 8 W. 3. B. R. Downes v. Turner.

10. Levinas moved, that on payment of 10s. into court, so much might be struck out of the declaration; but it appearing to be in a case upon an *indebitatus assumpsit* and *quantum meruit*, the

Covenant on 3 distinct covenants, several breaches were assigned; one was for non-payment of rent. Motion was made, that

But was allowed on accepting a new lease, and sealing a counterparty.

S. P. But the way is to confess the employing,

the court said he might do it as to the *indebitatus assumpsit*, but *not as to the quantum meruit*. Cumb. 264. Trin. 6 W. & M. B. R. Anon.

and that he deserved but so much, and to plead a tender thereof; for then the plaintiff may reply that he deserved more, and so come to issue; but because in most declarations there are *quantum meruit*, even in an *indebitat. ass.* there it may be brought in upon an *indebitat. count*, and that will affect the other, and so it was done; per Holt Ch. J. 12 Mod. 614. Hill. 13 W. 3. Anon.

The court granted it as to the *indebitatus assumpsit*, but refused it as to the *quantum meruit*; and the court said that such motion had been sometimes obtained, where a quantum meruit and *indebitatus* were joined together, yet regularly they ought not to be granted on a quantum meruit; for *who can tell what a man deserves till he be tried?* 12 Mod. 187. Pasch. 10 W. 3. Smith v. Johnson. — Comb. 20. S. P. Pasch. 2 Jac. B. R. Anon. * 2 Salk. 597. in pl. 3. cites Hill. 8 W. 3. accordingly. — But it was allowed afterwards Pasch. 9 Ann. B. R. Ibid.

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11. In *ejectment* brought on *forfeiture of a lease for non-payment of rent*, if the lessee will make oath that his lease is not expired, and bring all arrears into court, the court will not compel him to plead on the common rule. Cumb. 299. Mich. 6 W. & M. in B. R. Anon.

12. By Holt Ch. J. where the *plea is to the damages*, you cannot bring money into court; otherwise where the plea is to the *ground of the action*, as non-*assumpsit*. It may be allowed in *trover* where you bring the goods in specie into court, but rarely where only part of them are brought in. Cumb. 357. Hill. 8 W. 3. B. R. Burman v. Shepherd. In *trover* for a bill of exchange for a 100l. ad damnum of 150l. A motion was made, that upon bringing 50l. into court, it might be struck out of the declaration. Holt, this practice in *assumpsit* has been brought in within few years, and has been only allowed, because payment goes to the issue; but in *trover* it goes only to the damages. It may be the plaintiff has good cause of action for part, and a probable cause for the residue; now it would be hard to strike out his certain cause, and put him to his probable cause at the peril of costs. 12 Mod. 90. Hill. 7 W. 3. Burman v. Shepherd.

13. In *debt on bond*, defendant must bring in the *whole penalty*, or the court will not stay proceedings. 2 Salk. 597. in pl. 3. cites Hill. 9 W. 3. B. R.

But *ibid.* The reporter says, it seems it cannot be without bringing in the whole money; if the parties dispute the quantum, and there is a dispute how much is due, it cannot be referred. Trin. 11 W. 3. B. R.

14. Where an *account-render* is brought, if the defendant will plead *plene computavit*, and offer to bring the money into court, that will signify nothing; for that in a trial upon an action of account, the jury have nothing to do, unless an account stated be proved; but an account must be before auditors; for they are the judges and not the jury. L. P. R. 31. cites Pasch. 9 W. 3. B. R.

15. A *rent-charge* was granted to J. S. out of lands which were demised to several undertenants. The grantee of the rent distrained upon them all for one half year's rent-arrear. The tenants bring several *replevins*. The avowment makes the same avowry against them all. The plaintiffs in bar of the avowry, plead a tender with *profect in curia*. And now it was moved, that the bringing in one sum should serve for all the 3 avowries, they being for the same rent-arrear; and the motion was granted. Ex relatione M^ri Jacob. Ld. Raym. Rep. 429. Hill. 10 W. 3. Anon.

16. In replevin, defendant *avows for rent*, and plaintiff admitted to bring it into court. 2 Salk. 597. in pl. 3. Hill. 10 W. 3. B. R. Anon.

Defendant moved to pay 3 l. into court, in debt for rent, and plead nil debet; per Cur. be it so, it is common practice.

17. In *debt for rent*, it was moved to bring so much money into court; and Holt Ch. J. thought it hard, and said he remembered the beginning of these motions; the first was to bring in principal and interest on a bond; after that it came to an *indebitatus assumpsit*. It has been done in *debt for rent*, but not so freely; we do it in *ejectment* on a special reason, viz. because that action subsists entirely upon the rules of the court. 2 Salk. 597. cites it as by Holt Ch. J. Pasch. 10 W. 3. B. R.

Barnes's Notes in C. B. 195. Trin. 7 & 8 Geo. 2. Dixon v. Allen.

In *debt for rent*, rule to shew cause why defendant should not bring money into court upon the common rule, and plead nil debet, made absolute. Barnes's Notes in C. B. 198, Mich. 12 Geo. 2. White v. Daman.—— Ibid. cites Trin. 7 & 8 Geo. 2. Dixon v. Allen, S. P.

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18. An *action* was brought by the plaintiff against the defendant, for 100 l. *upon a wager*, that the peace would not be concluded by such a day. After the rules for pleading were out, it was moved, that upon the bringing in of 100 l. into court, and upon payment of costs, the plaintiff might proceed at his peril; for the dispute was only whether the plaintiff should have interest or not? And per Holt Ch. J. interest is never given by the jury in such case in the damages. Ruled, that the defendant should shew cause, &c. Ld. Raym. Rep. 398, 399. Mich. 10 W. 3. Medena v. Kilder.

In replevin, the bringing the money into court is superfluous in case of an avowry; for the money is not demanded, but the replevin is for the goods.

19. In a plea of tender of *rent in replevin* in bar, the money ought not to be brought into court. In *debt on a bond*, there may be a profer to save damages, because there the money is the thing in demand; but it cannot be in an avowry to a replevin, because the *avowry* is to justify the taking the cattle; and whether the money is paid or not, is not the question. But if the distress was rightfully taken, the avowant must have a return; if wrongfully, he must answer the plaintiff's damages. 2 Salk. 584. Hill. 12 W. 3. B. R. Horn v. Lewin.

12 Mod. 352. Horn v. Luines.—— Ld. Raym. Rep. 639. S. C. and ibid. 643, 644. S. P. per tot. Cur. And they all held that the bar to the avowry was ill pleaded, 1st, Because it is pleaded with a paratus, where it ought to be pleaded with an obtulit, &c. 2dly, Because it is pleaded in bar, where it ought to be pleaded only in excuse of damages; but if the tender had been well pleaded, it would have chased the avowant to shew a demand, to intitle him to the distress. But here the plea in bar not amounting to a tender, it is ill; and therefore the bringing in of the money, and the taking of it out, is superfluous. And judgment shall be upon the avowry for a returno habendo; and judgment was given for the avowant accordingly.

In trover, the defendant moved to bring a note into court. Mr. Serj. Darnell declared he had moved

20. It was moved that the defendant in *trover* after declaration, might bring *the thing itself*, and deliver it to the plaintiff. And Gould J. said, he had known it often done; otherwise where he would tender the value; for defendant shall not set a value upon the plaintiff's goods; and a motion was granted. 12 Mod. 397. Pasch. 12 W. 3. Farrel's case.

for and obtained a rule to bring into court 2 *farls* in one term, and the next term a *spare-rib* of pork or money in lieu thereof; Mr. Secondary Thomson remembered a motion to bring in a *bel* in *trover*, and several

Several other instances were given. The court thought it as reasonable that goods, or their value, should be brought into court in action of trover, as money in an assumpsit, and made a rule accordingly. Rep. of Pract. in C. B. 59. Mich. 4 Geo. 2. Tuney v. Clarke.

21. It was moved to bring so much money into court, to have it struck out of the declaration. Now the course is upon bringing money into court to pay costs so far, if the plaintiff will take it out; but if it be such an *action in which the defendant may plead tender in bar of costs*, and that the plaintiff, to oust him of that benefit, would *reply a special capias tested of a term antecedent to the principal*, all this may be opened and *settled on motion*; per Cur. 12 Mod. 633. Hill. 13 W. 3. Anon.

22. Note, the court will never give leave to bring principal and interest into court, and stay proceedings upon a bond, when the suit is upon a counter-bond, or when there is any pretence of a collateral agreement. 12 Mod. 598. Mich. 13 W. 3. Coke v. Heathcot.

23. Till bail put in, one is not in court to move to bring in principal, interest, and costs. 7 Mod. 140. Hill. 1 Ann. B. R. Anon.

24. In an action of debt brought upon articles, Holt Ch. J. said he never knew money brought into court and struck out of the declaration in debt, though it had been done on a *bond with condition in debt for rent*; and he said he had known it done in *replevin, where the distress was for rent*. 7 Mod. 141. Hill. 1 Ann. B. R. Anon.

25. Money has been brought into court and struck out of the declaration in a *mutuatus est*; per Holt Ch. J. who said, that the first notion ever made for bringing money into court upon a mutuatus was made by Levins in Keeling's time. 7 Mod. 141. Hill. 1 Ann. B. R. obiter.

26. After judgment in debt on bond, the court will not make a rule upon a plaintiff to take his principal, interest, and costs; and held, that in such case plaintiff ought to have his full costs out of the penalty. 7 Mod. 114. Mich. 1 Ann. B. R. Le Sagé v. Pere. [295]

27. In trover for a horse, it was moved to bring the saddle and bridle into court, but denied. 2 Salk. 597. 2 Ann. B. R. cites the case of Wilcocks the attorney.

28. Money ought not to be brought into court to have it struck out of the declaration where an *executor is plaintiff*, but you may plead a tender, & touts temps prist; per Cur. said to be settled here on debate. 6 Mod. 29. Mich. 2 Ann. B. R. Anon.

Per Holt Ch. J. at the sittings in Guildhall, in an action by an administrator. The defendant cannot bring money into court, because the administrator is not by law to pay costs; and Pasch. 5 Ann. B. R. in Gregg's case, an action was brought by an executor, for money due to his testator for law business done by him, it was moved to bring so much money into court, but denied. 2 Salk. 596. pl. 3. Pasch. 5 Ann. B. R. Gregg's case.

Upon the common motion to bring principal, interest, and costs into court, and refer to prothonotary, the court refused to grant the rule, the plaintiff being an executor, but said, the plaintiff might be willing to accept the debt and costs, and therefore they would grant a rule to shew cause. Barnes's Notes in C. B. 195. Hill. 6 Geo. 2. Bryan v. Holloway.

It was moved to discharge a rule to pay money into court, which was drawn up in common form, without distinguishing that *plaintiffs sued as administrators*, and the motion was granted. Barnes's Notes in C. B. 195. Hill. 8 Geo. 2. Satterthwaite, and his Wife administratrix, v. Watford.

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29. In *debt on a judgment*, the court will not stay proceedings on motion upon payment of principal, interest, and costs, as they will upon debt upon bond. 6 Mod. 60. Mich. 2 Ann. B. R. *Burridge v. Fortescue*.

30. Motion *before plea* to bring money into court, and have it struck out of the declaration, was denied. 6 Mod. 153. Pasch. 3 Ann. B. R. Anon.

31. 4 & 5 Ann. cap. 16. s. 13. *Pending an action on bond, the defendant may bring in principal, interest, and costs in law and equity, and then the court shall give judgment to discharge the defendant.*

32. *Covenant and breach for non-payment of rent, and for not repairing, &c.* It was moved, to bring in so much for the rent, and as to the other breach, that the plaintiff might proceed as he thought fit; and per Trevor, all the judges have agreed, (for he put the case to Holt Ch. J.) that it is but reasonable to allow it; that it does not differ from debt for rent; for though it be covenant, yet it is a covenant for payment of a sum certain. The same diversity was taken between covenant for a sum certain, and a thing uncertain; per Holt Ch. J. Hill. 9 W. 3. B. R. saying it did not differ from an *indebitatus assumpsit*. And Trin. 12 W. 3. B. R. same rule. 2 Salk. 596. in pl. 3. Pasch. 5 Ann. B. R. *Gregg's case*.

33. In an *action brought upon a policy of insurance*, it was moved for leave to bring 15 l. into court, being as much as they thought their average of the damage came to (*the goods not being lost, but only damaged*), and so the plaintiff to proceed upon peril of costs; per Powell J. the motion cannot be granted, though we have granted it in a quantum meruit, and also in covenant for payment of money; but in covenant for repairs we have denied it, and so we must here. 11 Mod. 270. pl. 12. Hill. 8 Ann. B. R. Anon.

[296] 34. In an action against an *executor, he paid money into court* upon the common rule, and on the trial, the plaintiff being non-suited, the executor moved that he might have the money out of court, and granted, because he being executor, was unacquainted with the affairs of his testator, and might not know whether the testator owed the plaintiff any money or not; but where the defendant is neither executor nor administrator, although the plaintiff be nonsuited, or a verdict for the defendant, the plaintiff shall have the money out of court, because the defendant brings it in as knowing, and being conscious that he owes the plaintiff so much. Rep. of Pract. in C. B. 5. Mich. 11 Ann. Anon.

35. A. by marriage articles was to pay 50 l. at 5 l. per ann. till all paid, and in failure of payment of any 5 l. then he was to pay the whole; per Cur. the power given to the court by the statute, is to stay all proceedings on payment of all that is due, and in the principal case all the 50 l. is due, and no part of it is a penalty, but only the defendant, by the condition of these articles, had time for the payment of the money by parcels, as therein directed, which he has lost the benefit of. 8 Mod. 56. Trin. 7 Geo. 1. Anon.

36. The

36. The court will not compel a creditor by *judgment* to accept a *less sum than is due* on the judgment, on account of any former indefinite payments, when there were other accounts depending between the parties, unless the defendant will consent to bring in all that is due to the plaintiff. 8 Mod. 236. Pasch. 10 Geo. 1. Anon.

37. In *replevin* defendant justified the *taking the cattle damage feasant*, and now moved to stay proceedings on bringing into court what was due, with costs; per Cur. if you bring in what is due on the replevin-bond, proceedings shall be stayed, but if it is to stay proceedings on payment of what is due for damages, it shall not be granted, because the court has no rule to guide them in such case; but it is otherwise for *rent*, for that is certain. 8 Mod. 379. Trin. 11 Geo. 1. Anon.

38. In action of *covenant in articles of agreement*, wherein defendant covenanted to find diet and lodging for plaintiff for a year, or to pay him 10l. the defendant, on affidavit that there was not above 10l. due, moved to bring it into court, and that the plaintiff might proceed at his peril. The court would not ascertain what was due for diet and lodging, but because the agreement was in the disjunctive, *to find diet and lodging, or to pay 10l.* a rule was made that defendant might bring the money into court. 8 Mod. 305: Mich. 11 Geo. 1. Savil v. Snell.

39. A motion to bring 100l. into court, the defendant suggesting that the *ejectment* was brought *for nonpayment of a fine, and for letting a lease, contrary to the custom of a manor*, and therefore he proposed to bring in the 100l. to answer the fine, and that the lessor of the plaintiff should proceed at his peril for the forfeiture in respect to the lease supposed to be let contrary to the custom of the manor, but the court denied the motion; for though it can be no disadvantage to a lessor to stay proceedings on payment of his rent and costs, yet the granting this motion may probably give the defendant such an advantage over the lessors, who have brought this ejectment for a just cause, as may do them injustice. Rep. of Pract. in C. B. 42. Hill. 1 Geo. 2. Rocks v. Atease, ex dimiss' dom. Briscoe vid. & al'.

40. On a rule to shew cause why 8s. should not be brought into court, and struck out of the declaration. It was moved, that this was a *quantum meruit for using a chaise hired of another* ill; and that the court had never gone so far as to allow of these motions in such cases; for, at this rate, they might come, in time, to allow of them in battery and trespass, &c. It is true indeed, it was answered, that in general quantum meruits for the hire of a chaise, &c. the court does grant them, and the court agreed to this difference; and the Ch. J. said, that this rule was first made in my Ld. Ch. J. Kelynge's time, and the reason of it he said was, for the difficulty of pleading a tender; accordingly they discharged the rule in this case. Barnard. Rep. in B. R. 25, 26. Mich. 1 Geo. 2. White v. Woodhouse.

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41. The plaintiff had declared for 3s. 2d. half-penny for rent, and 97s. upon a *mutuatus*. It was moved, that there was no colour that any more was due than the 3s. 2d. half-penny, and the 97s. was only added to make a cause of it in this court; and that if this practice was * allowed, it would lead to a great deal of oppression; and therefore he moved, that upon bringing in the money due upon the first count with costs, proceedings might be stayed. The court said, that they had never gone so far as to allow money to be brought upon one count; but however, as this was such a piece of evasion, the court made a rule to shew cause. Barnard. Rep. in B. R. 180. Trin. 2 Geo. 2. Bellow v. Pew.

42. An action of *assault and for taking away* 1s. moved to bring the shilling into court, and plaintiff to proceed at his peril for the residue; and a rule made to shew cause. But quære, whether it was ever made absolute, or opposed? Rep. of Pract. in C. B. 46. Trin. 2 Geo. 2. Smith v. Dobby.

43. Debt was brought upon a bond of 200l. the defendant had several demands likewise upon the plaintiff, so that upon the balance, there was but 25l. owing; upon which it was moved, that he might bring the balance into court, and said he thought this within the meaning of the late statute. But per Cur. the statute had prescribed only 2 particular ways of proceeding; one by pleading the matter of account specially; the other by giving the special matter in evidence upon the general issue; and said they could not allow of any other way of proceedings, and accordingly refused the motion. Barnard. Rep. in B. R. 214. Mich. 3 Geo. 2. Anon.

44. In debt upon an *emisset* for goods bought, where the party had declared according to the custom of the city of London, and which was removed up here by habeas corpus; it was moved, that money might be brought into court and be struck out of the declaration, and this was likened to the case of an *indebitatus assumpsit*; accordingly the court made a rule to shew cause. Barnard. Rep. in B. R. 420. Hill. 4 Geo. 2. Lepege v. Pompylion.

45. In an action of *trespass* brought for the mean profits; after a recovery in *ejectment*, it was moved to bring the money into court, and that it might be struck out of the declaration. But the court said, this was an action founded upon a tort, and therefore refused the motion. Barnard. Rep. in B. R. 368. Mich. 4 Geo. 2. Chairman v. Edwards.

46. In case for *dilapidations*, it was moved, that money might be brought into court and struck out of the declaration. But Page J. said, these motions are never granted where the damages are so very uncertain, and therefore never allowed in covenant for want of repairs; he said too, that formerly these motions he has known refused even in quantum meruits. Accordingly (the Ch. J. absent) the court thought proper not to make any rule. 2 Barnard. Rep. in B. R. 4. Trin. 5 Geo. 2. Squire v. Archer.

47. Per Cur. money may be paid into court upon the common rule, after rule to plead is out, at any time before plea pleaded.

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pleaded. Barnes's Notes in C. B. 194. Mich. 6 Geo. 2. Anon.

48. Defendant brought money into court upon the common rule (plaintiff refusing to accept the same) and *pleaded the general issue*. Plaintiff joined and delivered the issue book, with *notice of trial*. Plaintiff did *not proceed farther*, but moved to have the money out of court, with *costs to the time of bringing the money into the court*; which was ordered upon plaintiff's payment of *costs to defendant subsequent to the time of bringing the money into court*. Barnes's Notes in C. B. 195, 196. Hill. 8 Geo. 2. Savage v. Franklyn.

49. Money was paid into court by defendant, upon the common rule; and plaintiff proceeded to trial, and *recovered a smaller sum than that paid into court*. Moved in the treasury, that defendant might have the money out of court towards his costs; and ordered, upon hearing the attornies on both sides. Barnes's Notes in C. B. 196. Hill. 8 Geo. 2. Anon.

50. In *trover*, it was moved for defendant to bring the goods *specified in the declaration* into court; but the goods being *ponderous*, the motion was denied; per Cur. Let the plaintiff shew cause why he should not consent to accept the goods and costs. Barnes's Notes in C. B. 197. Trin. 10 G. 2. Cooke v. Holgate.

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Rep. of
Pract. in
C. B. 130.
S. C. ruled
accordingly,
they being
many house-

hold goods; and says such motion was denied Hill. 6 Geo. 2. Watkinson v. Cockshott.

51. A rule to pay 1l. 11s. 6d. into court was discharged, the money not having been paid in till *after plea pleaded*. Barnes's Notes in C. B. 198. Hill. 11 Geo. 2. Straphon v. Thompson.

52. Per Cur. money cannot be brought in *after regular judgment*. Barnes's Notes in C. B. 198. Mich. 12 Geo. 2. Burgefs v. Pollamounter.

Rep. of
Pract. in
C. B. 85.
Hill. 6 Geo.

2. Spring v. Bilson, S. P. accordingly.



(B) In what Cases it shall be delivered to the Plaintiff, or re-delivered to the Defendant.

1. **I**N debt, the defendant said as to parcel that he has been always ready to pay, and yet is, and brought the money into court, and to the rest pleaded in bar; the plaintiff pleaded in estoppel to the saying that he has been always ready, &c. for he imparled the last term. Judgment if he shall be received to say, that always ready, &c. And per Danby, the plaintiff shall not have the money here, till the other issue be tried, and this by reason that the damages shall not yet be tried; but per Prisot, he may have judgment of his debt of this parcel, and his damages, and cesset executio; for those may be well assessed by the court as to this parcel, but the plaintiff shall not have it till the other issue be tried, by reason that the costs are entire, which cannot be taxed till the other issue be tried; and when the plaintiff pleaded the estoppel above, the defendant prayed to re-have his money again. And per Prisot, he shall re-have it, quod non fuit concessum; for he has confessed of this part. And, by him, if the plaintiff will relinquish the estoppel, he shall have livery of the money without damages and costs; and the plaintiff after relinquished the estoppel, by which the money was delivered to him. Br. Touts Temps, &c. pl. 22. cites 36 H. 6. 13.

S. C. cited
Noy, 110. in
case of
Bridges v.
Raymond,
where the
case was,
viz. in debt
on bond to
pay a less
sum, de-
fendant
pleaded ten-
der at the
day and
place, plain-
tiff takes

2. Debt upon an obligation of 10l. to pay 40s. such a day. The defendant pleaded payment of 20s. at the day, and that he offered 20s. residue there the same day, and that the plaintiff refused it, and that he has been always ready to pay, and yet is, and tendered the money in court; and the plaintiff tendered to aver that he did not tender the 20s. at the day; and per Cur. now the defendant shall have the money again, and so he had; and if the issue be found for the plaintiff, the obligation is forfeited; and if it be found for the defendant, the plaintiff has lost his 20s. quod nota; for he has refused it by matter of record, and taken the other issue at his peril. Br. Tout Temps, &c. pl. 32. cites 21 E. 4. 25.

which is found against him; and now he prays to have the money out of court, but it was denied; for he has lost that advantage by taking issue on the tender, and that he was too covetous, and by seeking to gain all, he has lost all. — Sty. 388. Mich. 1653. B. R. Benksin v. Herisk. S. P.

Defendant brought 10l. into court, and had it struck out of the declaration, afterwards the plaintiff suffered a nonsuit; and the question was, whether he should be allowed to take this money? Et per Cur. he shall; for so much the defendant has admitted to be due, and so much he has actually paid him, and if the cause had gone on to trial, there must have been a verdict for the plaintiff as to so much, for this is admitted to be due, and paid down as the plaintiff's money, otherwise perhaps of money paid into court by way of tender. If a man pleads a tender and uncure prist, and pays the money into court, and the plaintiff takes issue on the tender, and it is found against him, the defendant shall have the money. 2 Salk. 597. pl. 4. Mich. 9 Ann. B. R. Elliot v. Callow, cites Sty. 388.

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3. Money being brought into court on the common rule, and the *plaintiff nonsuited*; the defendant moved to have the money out of the court, but the motion was denied; for he paid it into court, as knowing, and being conscious that he owed the plaintiff so much, and therefore the plaintiff shall have it. Rep. of Pract. in C. B. 36. Trin. 13 Geo. 1. Lane & al' v. Wilkinfon.

4. An order was made by the Ch. J. at his chambers, that proceedings upon the bail bond should be stayed upon paying 17l. into court. *Four services* had been *given* of this rule, and yet the plaintiff would not take the money. It was moved, that the money may be repaid; for that there must be a reasonable time in which the plaintiff must be bound to take it, and accordingly the court made a rule, that the plaintiff should accept it within a week. Barnard. Rep. in B. R. 73. Trin. 2 Geo. 2. Parker v. Stephens.

5. 63s. being brought into court upon the common rule, and *verdict for the defendant*, upon motion in the treasury, and hearing the attornies on both sides, it was *ordered*, *that the defendant should have the money out of court in part of his costs*. Rep. of Pract. in C. B. 54. Trin. 2 & 3 Geo. 2. Rathbone v. Stedman.

6. Motion was made, upon an affidavit that the *defendant was dead*, that 10l. formerly paid into court upon the common rule, might be *paid out to his executors*, but denied per Cur. Barnes's Notes in C. B. 194. Mich. 6 Geo. 2. Knapton v. Drew.

7. 'The *plaintiff being dead*, the defendant moved to have 10l. out of court, but it was objected, that it belonged to the plaintiff's executor. After hearing counsel on both sides, a rule was made, that the plaintiff's *executor should bring a new action*, and in the mean time all things should stay. Rep. of Pract. in C. B. 129. Pasch. 9 Geo. 2. Crockhay v. Martin.

S. C. and the court were of opinion, that the money being paid into court for plaintiff's use,

ought not to be paid back to defendant. The court have not gone so far as to order payment to plaintiff's executor, but it seems reasonable, if the executor be willing to accept the money paid into court, and after trial it is plain executor is intitled to the money paid into court, though a smaller sum be recovered; had plaintiff lived, and refused to accept the money paid into court, and been nonsuited upon the trial, yet defendant could not have the money back out of court, plaintiff being intitled thereto in all events, as determined in Lane and Wilkinfon's case. Barnes's Notes in C. B. 196, 197. Easter, 9 Geo. 2. Crockay v. Martin.

(C) Allowed. Upon what Plea.

1. **A.** Suggested by *affidavit*, that he was in execution for 50*l.* upon a judgment at the suit of B. and that he had tendered the same to B. which B. refused to accept, but still detained him in prison, so prayed, that upon bringing so much into court, he might be discharged. B. opposed it, setting forth, that after the said judgment and execution, A. put him to considerable charges in chancery concerning the same, and that he had costs assessed him upon the said A. and therefore prayed that he might remain in prison till he paid both; but the court said, they would take no consance of the costs in chancery, and therefore granted A. his motion. Comb. 387. Mich. 8 W. 3. B. R. Anon.

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2. It was moved to bring money into court, and that they might plead *non assumpsit infra sex annos*; but the court said, they never allow these motions, but upon pleading the *general issue*. Barnard. Rep. in B. R. 308. Pasch. 2 Geo. 2. C. B. Anon.

3. On a motion for liberty to tender money into court upon some of the promises in the declaration, and to demur to one of the promises, a rule nisi was granted; but on hearing counsel on both sides, the court declared, that a tender of money was in order to make an end of the cause, and not to delay it, and therefore discharged the rule to shew cause. Rep. of Pract. in C. B. 48. Mich. 2 Geo. 2. Tames v. Gosey.

4. On motion that 20*l.* which had been paid into court, might be restored to the defendant, by reason that the plaintiff died before verdict, and several applications had been made to the executors to take the money, but they had not done it. Page J. said, that in C. B. he believed such motion might be regular, because there the bringing it into court is not direct payment; for if the plaintiff does not prove upon the trial, that so much is due to him as is brought in, the defendant is intitled to the remainder back again; but in this court it is direct payment, and though so much money as is brought into court should not be proved to be due, yet the plaintiff is intitled to the whole; accordingly the motion was refused, the Ch. J. absent. 2 Barnard. Rep. in B. R. 186, 187. Mich. 6 Geo. 2. Jenner v. Paddington,

(D) The Effect of accepting the Money brought into Court.

1. *DEBT upon an obligation conditioned for the payment of a less sum.* The defendant *pleaded tender at the day & tous temps prist*; the plaintiff received the principal sum in court, and judgment to acquit the defendant of the sum received, and the plaintiff, to have damages, alledges a demand of the money from the defendant; and it was thereupon demurred and adjudged for the defendant; *for if the plaintiff would have damages, he ought not to have received the money, but to suffer it to remain in court; for after judgment, quod eat inde sine die, no issue shall be taken.* Cro. J. 126. pl. 13. Trin. 4 Jac. B. R. Hanold v. Clotworthy.

S. C. cited
Arg. Ld.
Raym. Rep.
642. in case
of Horn v.
Lewin.

2. A rule was obtained for payment of 5 l. into court, the money had been tendered, but was refused, and on that refusal brought into court, and costs taxed. The defendant insisted, that no costs ought to be paid, the plaintiff having refused the money. The counsel for the defendant insisted, that the refusing the money when tendered, had put the defendant to the charge of paying it into court and pleading, therefore the plaintiff ought to pay costs from the time of the refusal; but the court over-ruled this, for *though the defendant tendered the money, she could not tender the costs before they were taxed.* Rep. of Pract. in C.B. 120, 121. Trin. 8 & 9 Geo. 2. Cotton v. Perks.

For more of Bringing Money into Court, in general, see other proper titles.

(A) Burrough.

[1. 12 Ed. 1. **R**OTULA Walliæ membrana 3. *pro burgen-
sibus de Carnarvan, de libertatibus suis, &c.* it
begins with the king's grant, *quod sit liber burgus & homines liberi
burgenses, &c.* membrana 4. *pro burgensibus de Aberconwey de liber-
tatibus suis, &c.* in such manner as the other, &c.]

[2. 5 Ed. 1. Rot. Cartarum membrana 14. part 2. grant of the
king, *quod villa nostra de nova Windsor sit liber burgus & habeat
libertates, &c.*]

[3. 6 Ed. 1. Rot. Cartarum membrana 4. part. libertates antea,
that he hath made liber burgus.]

[4. 18 Ed. 1. Rot. Cartarum membrana 2. grant to the town
of *Bafenweck*, *quod sit liber burgus, & quod inhabitantes liberi
burgenses, cum omnibus libertatibus, & consuetudinibus ad bur-
gum, &c.*]

[5. 12 Ed. 1. Rot. Pat. M. 14. rex concessit *quod villa de Lime
in comitatu Dorsetiæ sit liber burgus & homines ejusdem villæ sint
liberi burgenses, ita quod habeant gildam mercatoriam, cum om-
nibus ad gildam spectantibus.*]

For more of Burrough, in general, see other proper titles.

By-Laws.

(A) By-Laws. Who may make them.

Fol. 368.

[1. 15 H. 6. cap. 6. **I**T is enacted, that no masters, wardens, or people of guilds, fraternities, and other companies incorporate, shall make or use any ordinance which shall be to the diminution or disinheritation of the franchises of the king or others, nor against the common profit of the people, nor any other ordinance of charge, &c. but this is expired as 19 H. 7. cap. 7. where it is enacted, that no ordinance shall be made in diminution or disinheritation of the prerogative of the king nor other, nor against the common profit of the people, unless they are examined and approved by the chancellor, treasurer of England, chief justices of either bench, or 3 of them, or both justices of assize, in their circuit where the ordinance is, &c. nor shall distrain any to sue to the king against such ordinances.]

[2. 3 H. 7. cap. 9. [recites that] an ordinance [was] made in London, upon pain that no freeman of the city shall go or come to any fair or market out of the city of London, with any manner of wares, &c. to sell or barter, to the intent that all buyers and merchants should resort to the said city to buy, &c. and this ordinance was [made] void by the [this] statute, because of the great damage which was likely to come by it.] [302]

[3. 12 H. 7. cap. 16. [6. recites that] a by-law [was] made by the merchant-adventurers, that none shall sell or buy at the 4 marts within the dominions of the duke of Burgundy, before composition made by fine with the said merchant-adventurers, contrary to the liberty of every Englishman, and to the liberty of the said mart, and therefore enacted that this ordinance shall be void.]

[4. If an ordinance be made by a corporation which hath power to make it by custom or charter, if the ordinance be reasonable and lawful, it may be put in execution without any allowance by the chancellor, treasurer, or others, &c. according to the statute of 19 H. 7. cap. 7. co. 5. Chamb. Lond. 63. b. (but it seems that they forfeit the penalty of the statute, and it does not make the ordinance void.)]

5. By-laws made have a foundation on patent, custom, or consent. Every by-law is grounded on charter or prescription; Arg. Cart. 178: Hill. 18 & 19 Car. 2. C. B. in case of the Earl of Exeter v. Smith.

per Holt Ch. J. 12 Mod. 683.

6. The

6. The making by-laws is incident to every corporation aggregate; for that power is included in the incorporation; per Holt Ch. J. Carth. 482. Pafch. 11 W. 3. B. R. London City v. Vanaker.

Of common right every corporation may make a by-law concerning any franchise granted to them, because it is for the welfare of the body politic, and included in the very act of incorporation. 12 Mod.

7. The privilege of making of by-laws is vested in the city of London by common right, if not by custom; for it concerns the better government of the city; and every city and town corporate may, by a power inherent to their constitution, make by-laws for the government of that body politic, and this is the true touchstone of by-laws. And note, it was said by the Ld. Hobart in his Rep. fol. 211. that he holds that the power to make by-laws, given by special clause in all corporation-patents, is needless, that power being included by law in the incorporating act; for as reason is given to the natural body to govern it, so the politic body must have laws, as a politic reason, to govern it; per Holt Ch. J. in delivering the judgment of the court. 5 Mod. 439. Trin. 11 W. 3. London City v. Vanacre.

270. The City of London v. Vanacre — S. C. cited by Holt Ch. J. 12 Mod. 686. The City of London v. Wood.

A corporation has an implied power to make by-laws; but where the charter gives the company a power to make by-laws, they can only make them in such cases as they are enabled to do by the charter; for such power given by the charter, implies a negative that they shall not make by-laws in any other cases; per Ld. C. Macclesfield. 2 Wms.'s Rep. 209. Hill. 1723. Child v. the Hudson's Bay Company.

2 Salk. 397. pl. 3. S. C. but S. P. does not appear.

8. Every by-law is a law, and as obligatory to all persons bound by it, that is, within its jurisdiction, as any act of parliament, only with this difference, that a by-law is liable to have its validity brought in question, but an act of parliament is not; but when a by-law is once adjudged to be a good and reasonable law, it is to all intents as binding to those that it extends to, as an act of parliament can be; per Holt Ch. J. 12 Mod. 678. Hill. 13 W. 3. in case of the City of London v. Wood.

(A. 2) *What shall be said a good By-Law.*

[1. *E* D. 6. incorporated the town of St. Alban's by the name of mayor, &c. and granted to them power to make ordinances; and after, when the term was appointed to be there, by the assent of A. and other burgesses, they assessed a sum upon every inhabitant for the charges in erection of courts there, and ordained that if any refuse to pay, &c. they shall be imprisoned. This is not a good ordinance to imprison men if they do not pay, because it is against the statute of magna charta, nullus liber homo, &c. but they might have inflicted a reasonable penalty, but not imprisonment, which penalty they might have limited to be levied by distress. or to have an action of debt for it. Co. 5. CLERK'S CASE, adjudged, 64.]

5 Rep. 64.
a. Trin. 38
Eliz. C. B.
Clark's case,
al' Clark v.
Gape; and
in action for
false imprisonment the
plaintiff had
judgment.
—S.C. cited
2 Inst. 54.
—S.C. cited
2 Bulst. 328.
—S. C. cited Jo. 162. pl. 2. — 8 Rep. 127. b. S. C. cited. — S. C. cited 5 Mod. 157.
—Mo. 380. Arg. cites Trin. 38 Eliz. C. B. and seems to intend S. C. though the point is somewhat different, viz. that a by-law was made at St. Alban's for every inhabitant to pay a sum of money certain, in contribution for making the vill clean and serviceable for the term to be kept there, and ruled good; but because they assessed corporal punishment of imprisonment upon the offender, it was ill, and adjudged void in action of false imprisonment, because contrary to magna charta. — See (C) pl. 1. and the notes there. — Jo. 162. pl. 2. Trin. 3 Car. B. R. in case of the King v. the Corporation of Boston, S. P.

[2. King Charles made the fourmakers of London a corporation, and gave to them power to make ordinances, and they made an ordinance that none should use the trade till he was free of the corporation, and that if any who was not free did use it, he should forfeit 40s. for every week which he did use it, and to be committed for it; and after they committed J. S. for using the trade, and not paying 40s. contrary to the ordinance. This is not lawful to imprison him. Hill. 14 Car. B. R. HARDCASTLE'S CASE, per Curiam, resolved upon an habeas corpus, and he delivered accordingly.]

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[3. A by-law by a corporation of weavers in a town, to restrain apprentices educated in the same trade within the same town for 7 years after the making of the by-law, is utterly void. Hobart's Reports, 285.]

Hob. 210.
pl. 268.
Pasch. 14
Jac. Norris
v. Staps,
S. C. —

Hutt. 5, 6. S. C. agreed that the ordinance was against law, and judgment against the plaintiffs. — Brownl. 48, 49. S. C. adjudged for the defendant. — Mo. 869. pl. 1205. S. C. says that the ordinance was, that none should exercise the trade within the town, unless that he had been an apprentice within the town 7 years before the ordinance made; and adjudged that the by-law was against reason. — Hob. 211. S. P. which Hobart Ch. J. said was absurd. — See Freem. Rep. 36, 37. pl. 44. C. B. The Mayor, &c. of St. Alban's v. Dobbins.

[4. A

Hob. 211.
S. C. and
Hobart Ch.
J. says, that
this was the
question
chiefly in-
tended, and
which he

[4. A new corporation, not having any prescription to appropriate to themselves and exclude others, cannot make a by-law to exclude all persons from using an art or trade in their town, to which they were not apprentices in the same town, though they have served as apprentices to it in another place. Hobart's Reports, 285. between NORRIS AND STAPES.]

says is indeed great, and wherein the question is between the particular privileges of towns, and the general liberties of the people, which is fit to receive a determination, because it runs through the realm; but says this point was not spoken to at the bench, but reserved till some other action should require it. — Mo. 869. pl. 3205. S. C. and adjudged that the action did not lie, because they were incorporated within time of memory, and after the statute of 5 Elis. so that the power to make by-laws is not given to them. — Cro. J. 597. pl. 19. Mich. 18 Jac. B. R. in case of Broad v. Jollyfe, it was said that a prescription to restrain one from using a trade in such a place is good. — Raym. 294. Arg. cites Mich. 1656. in C. B. Osborne's case, where, after many arguments, a * difference was agreed between by-laws made by virtue of a custom, and where they are made by virtue of a charter; and that so is Cro. J. 597. Broad's case, that a custom is stronger than a charter. — S. P. Arg. Cart. 69. and ibid. 118. Mich. 18 Car. 2. C. B. in case of Colcheiter (Mayor), &c. v. Goodwin, common law forbids not a man to exercise a trade any where, yet a custom may restrain it; per Tirrell J. cites 43 E. 3. 52. and if such a by-law had been by a new corporation, it is a dispute whether it had been good, and such a law is not against any statute, it being good by custom and prescription, and cites 8 Rep. 121. where this difference is taken. And ibid. 120. Bridgman Ch. J. held, that a custom, in such a case, will warrant that which a grant cannot do; and as to what was said that by-laws for restraint of trade ought to be taken strictly, he denies that; for when they are to strengthen a corporation, and to regulate a trade, they ought not to be taken strictly, because a general liberty of trade, without a regulation, does more hurt than good. — See Freem. Rep. 36, 37. pl. 44. Trin. 1672. Mayor, &c. of St. Alban's v. Dobbins.

* [304]

A by-law was made in London, that there should be no more than 420 carts let to hire in London, and if more are used, then the owner should forfeit 40 s. It was objected this was not a good by-law,

[5. King Edw. 3. by his letters patents gave authority to the mayor and commonalty of London to make by-laws among them, for the better government of the city, and this was confirmed by act of parliament; and after a by-law was there made, that no carman within the city should go with his cart without a licence of the guardians of such an hospital; and that if any one did to the contrary, that then he shall forfeit 15 s. for every time. This is a void by-law, because it is in restraint of the liberty of the trade of a carman, and so against reason; for this tends only to the private benefit of the guardians of the hospital, and is in nature of a monopoly. Trin. 42 Eliz. B. R. between PAYNE AND HAUGHTON, adjudged.]

because it was a restraint to trade; but the court held the by-law good; for if the number of carts be not restrained, they might be a great nuisance in stopping up the streets, and hindering passage. Sid. 284. pl. 18. Pasch. 18 Car. 2. B. R. Player v. Jenkins. — 2 Keb. 27. pl. 57. S. C. and a procedendo was awarded, nisi. — Vent. 21. Pasch. 21 Car. 2. B. R. Player v. Jones, S. P. resolved that the by-law in London, whereby the number of carts were restrained, is a good by-law. — 2 Keb. 400. pl. 39. S. C. and agreed the by-law to be good. — Ibid. 501. pl. 64. S. C. and a procedendo was awarded. — S. C. cited by Holt Ch. J. in delivering the opinion of the court. 5 Mod. 441. Trin. 11 W. 3.

At a common council held April 2d, 1677, it was enacted, that a former by-law concerning the ordering of carts and carmen, should be repealed; and that the president of Christ's hospital shall have the ordering thereof; and that there shall be no more than 420 carts to work in the city and liberties thereof for hire; and that 17 s. 6 d. and no more, shall be paid yearly for every cart; and 20 s. and no more, for a fine upon any admittance or alienation of a cart, which shall be applied towards the relief of the poor orphans in Christ's hospital; and that if any wharfinger, or retailer in fuel, shall keep or work a cart not licensed by the president and governors of the said hospital, he shall forfeit 13 s. 4 d. to be recovered by action of debt, in the name of the chamberlain of the city, in the lord mayor's court. It

was

was argued that this was a void by-law, because in all privileges, either by custom or by charter, to make by-laws, there must be this clause either expressed or implied, that they be ad utilitatem regis & populi & rationi consona. Now it may properly be said to be ad utilitatem populi, when the advantages are mutual, that is, when the duty is equivalent to the profit; so is the case of Blackwell-hall, 5 Rep. 62. b. where the penny for hallage is equivalent to the labour of the searcher; but here, by this by-law, there is 17 s. 6 d. per ann. rent, and 20 s. fine, to be paid by the carmen, not in respect to any thing for overseeing and ordering their carts, but for the use of the poor of Christ's hospital; so that it is a mere imposition, without any regard to the thing in question. Adjudged by the whole court, nemine contradicente, that the by-law was not good, by reason of the fine and rent; but in all things else was very good, and a procedendo was granted. Raym. 288. 324. Mich. 31 Car. 2. in the Exchequer-Chamber, Player v. Vere.

[6. So if the merchant-tailors of London, by force of a charter of the king, which gives to them authority to make by-laws, make a by-law that no merchant shall put his cloth to be dressed but at a clothworker's of their company, this is a void by-law; for it is against reason, and the general liberty of the subject, to be restrained from putting his work to whom he pleases. Trin. 42 EL. B. R. adjudged.]

out one half of his clothes to be dressed, &c. to some brother of their company. Adjudged that this by-law is in effect a monopoly, and that a prescription of such kind to induce the sole trade or traffic to a company or one person, and thereby to exclude others, is against law. — S. C. cited Mo. 672. that the by-law was held void. — S. C. cited 11 Rep. 86. per Cur. accordingly, and that the power they had by charter to make ordinances, was with an ita quod they be consonant to law & reason, and that it was adjudged, that though this ordinance had the countenance of a charter, yet it was against the common law, because it was against the liberty of the subject; for every subject has freedom by the law to put his clothes to be dressed by what clothworker he please, and the restraining it to certain persons is in effect a monopoly, and therefore such by-law by colour of a charter, or any grant by charter to such effect, will be void. — 2 Inf. 47. S. P. — S. C. cited by Archer J. Cart. 116.

[7. If the corporation of tailors in Ipswich, by force of the king's patent, which gives them power to make by-laws for their better government, so that they be according to the law of England, make a by-law that none shall exercise the trade of a tailor in Ipswich, qui non fuerit allocatus per legale warrantum vel authoritatem datam by the said corporation, or 3 of the masters and wardens, nor shall set up any shop for this art, nor shall exercise it, until such time as they have presented themselves to the master, &c. or 3 of them, or † proved that they have served in this trade as an apprentice for 7 years; and if any does contrary, that he shall forfeit 3l. to the said corporation; this is a void by-law, because by this none shall exercise his trade without their allowance, and because it is not known what proof is sufficient † within the by-law. P. 12 Jac. B. R. The CORPORATION OF IPSWICH, adjudged.]

judged. — S. C. cited Arg. Comb. 221. and says the reason of that resolution in Ld. Coke's 11 Rep. was because it tended to the restraint of trade, &c.

† Doderidge J. asked how this proof should be made, and whether the wardens should be judges of this proof, what shall be sufficient, and what not? and Coke Ch. J. to the same purpose, and said that they cannot take an oath; for how an oath should be warrantable by a patent he did not know. Roll. Rep. 5. S. C. — And Godb. 254. says it was agreed that the proof cannot be upon oath; for such a corporation cannot administer an oath to the party, and then the proof must be by his indentures and witnesses, and perhaps the corporation will not allow of any of them; for which the party has no remedy against the corporation but by his action at the common law, and in the mean time he should be barred of his trade, which is all his living and maintenance, and to which he had been apprentice for 7 years; and because by this way they should be judges in their own cause, which is against law; and the king cannot grant to another to do a thing which is against the law.

Mo. 576. pl. 796. Davenant v. Hurdis, S. C. says the ordinance was that every brother of that society should put

* [305]

11 Rep. 53. S. C. adjudged. — Roll. Rep. 4. pl. 6. Tailors of Ipswich v. Sherring, S. C. adjudged. — Godb. 252. pl. 351. The Clothworkers of Ipswich's case.

† Fol. 365.

S. C. ad.

5 Rep. 62.
5 Mich. 32
& 33 Eliz.
B. R. —
3 Le. 264,
265. pl. 355.
S. C. but for
the state or
point of it
refers to 5
Rep. and
says, a pro-
cedendo was
granted. —
S. C. cited
Arg. Mo.
580.

[8. If an ordinance be made in London, by the common council (who hath power by custom, which is, among other customs, confirmed by act of parliament by general words), that if any freeman, citizen, or stranger, within the city, shall put any broad-cloth to sale within the city of London, before it be brought to Blackwell-hall to be viewed and searched, so that it may appear to be saleable, and that hallage be paid for it, scilicet, 1d. for every cloth, that he shall forfeit for every cloth 6s. 8d. this is a good ordinance, as well to bind strangers as freemen, because it is made to prevent fraud and falsity in cloth, and for the better execution of the statutes without deceit, and the 1d. for hallage is but a reasonable expence of charge for the benefit which the subject hath by it. Co. 5. Chamb. Lond. 62. resolved.]

Roll. Rep.
312. pl. 22.
S. C. the
court to in-
form them-
selves of the
truth of the
damage aris-
ing from
these hot-

[9. If a by-law be made in London, that none shall make a hot-press, nor use it within the city, under the penalty of 10l. for the making thereof, and 5l. for the use thereof, this is a good by-law, because the using of these presses is dangerous for fire, and deceitful, inasmuch as this makes cloths and stuffs better to the eye than they are in truth. Hill. 13 Jac. B. R. EDWARDS's case, adjudged upon a habeas corpus.]

presses, appointed certain of the company of cloth-workers to come into court and inform them, which they did, and upon their affirming the danger and deceit of them, and likewise on reading the statute of 5 E. 6. [cap. 6.] the by-law was held good, and a procedendo granted.

* [306]

Cro.C. 497.
pl. 2. James
v. Turney,
S. C. and
held good,
per tot. Cur.
—Jo. 421.
pl. 9. S. C.
but S. P.
does not ap-
pear. —Ibid.
434. pl. 1.
S. C. but
S. P. does
not appear.
—Mar. 28.
pl. 64. the
arguments
of the Ld.
Ch. J. —
S. C. cited
Arg. Cart.
178. —† D.
322. b. 323.
a. pl. 23.
Ld. Crom-
well's case,
where a by-
law was
made by the
homage as to
the turning
in and pas-
turing beasts

[10. If there hath been a court (which is called *curia legalis*) held by the lord of a manor, time out of mind, in a great moor, part * of the manor (in which many men have common), for the better ordering of the common there, at which all the commoners ought to appear by the custom, and there hath used to be a homage sworn by the steward, which homage hath used to present all oppressions and offences in the common, and to make by-laws and ordinances for the better ordering of the common, which ordinances the commoners ought to obey, under a reasonable penalty, upon them to be assessed, to be forfeited to the lord, &c. and the homage sworn, make a by-law, that no commoner shall put his sheep within a part of the moor, under the pain of 3s. 4d. to be forfeited to the lord, and this by-law is published and proclaimed in court, this is a good by-law, and shall bind all the commoners, because this by-law arose out of a custom which began by consent of parties; also, this does not take away all the common, for he may have common for other cattle, and that more abundant; also, he is not restrained as to sheep in all the moor, but only in one part, and this is in nature of an act of parliament as time and occasion requires, as perhaps by inundation, or other occasion, it may be inconvenient for sheep, and at another court, when the occasion is taken away, it may be altered; and this shall bind as well homagers as other commoners; and this is not like the case of † D. 15 El. 322. and † 2 H. 4. 24. b. because there the commoners had their common at the will of the lord only, and in this case the

the commoner ought to take notice of this by-law, without any particular notice given to him, or otherwise he shall forfeit the penalty, because he ought to appear at the court, and the custom is alleged to be, that if the by-law be proclaimed, that it shall bind all commoners, and this is a personal thing, ergo, Trin. 14 Car. B. R. between TINTENY AND JAMES, per (§) Curiam, adjudged in a writ of error, upon a judgment in Banco, where it was adjudged upon demurrer accordingly; Intratur, Trin. 9 Car. Rot. 234. This concerned Sir John Stowell, and his manor of Somerton, in the county of Somerset.]

In the common, that if any of the tenants should put in his beasts before the farmer of the rectory of N. should ring a bell

§ Fol. 366.

in the belfry of the church there, such tenant should forfeit 10 s. and this by-law was held good. — See (B) pl. 1.

† Br. Customs, pl. 12. cites S. C.

11. A by-law was made by the homage of the court of a manor, *that no tenant should put any sheep to pasture in any common land of the manor, but only in his several demesne*, on pain of forfeiting 4d. for every sheep. Manwood thought it not good, because the inheritance is thereby taken away; and though the plaintiff himself was one of the homage, yet that is not material; for though a man may give away his inheritance by grant or feoffment, yet he cannot do it by his assent. Curia advisare vult. Dal. 95. pl. 23. anno 15 Eliz. Franklin v. Cromwell.

12. A by-law was, *that none should bring any sand, nor sell, nor use any within the city or suburbs of London, but only that which was taken out of the river Thames*, under the penalty of 5l. for the 1st, and 10l. for the 2d offence, and held not good. Godb. 106. pl. 126. Mich. 28 & 29 Eliz. C. B. Anon.

S. C. cited Arg. Raym. 293.

13. Every by-law ought to be made *for the common benefit* of the inhabitants, and not for the private advantage of any particular man, as J. S. only, or the lord only; as if a by-law is made, that no person shall put his cattle into the common field before such a day, this is good; but if it be, that they shall not carry their hay over the lord's lands, or break the hedges of J. S. this is not good, because it does not respect the common benefit of all. Goldsb. 49. pl. 13. Hill. 30 Eliz. Anon.

By-law ought to be in furtherance of the public good, and the better execution of the laws, and not to prejudice the subjects, or for private gain. Arg. Mo. 580.

14. At a court of the manor a by-law was made by the majority of the tenants then present, *that no tenant, for the future, should keep in the common fields, any steer above a year old, upon pain of 6d. for every offence*. Adjudged, that this by-law was against reason, because it was *to bind the inheritance of the tenants*, if they had any inheritance in this common, and that without their consent, which they cannot do without course of law. And. 234. pl. 250. Mich. 31 & 32 Eliz. Latton v. Erbury.

[307]
Le. 190. pl. 270. Erbury v. Latton, S. C. and the by-law held ill, because it is against common right where a man has common for all his

cattle commonable to restrain him to one kind of cattle.

5 Rep. 64.
a. Trin. 38
Eliz. Clark's
case, alias
Clark v.
Gape, seems
to be S. C.
but not S. P.

15. In false imprisonment the defendant justified, that the borough of St. Alban's had authority by charter to make by-laws for the government of townsmen, and they made a by-law, *that if any burghers gives opprobrious words to the mayor, he should be imprisoned by the mayor during his pleasure*, and that he being mayor, sent an officer to the defendant, being a burghers, to come to the common-hall for the affairs of the town. He sent him this answer, Let the mayor come to me if he will, for I will not come to him. Adjudged the justification was not good, that the by-law was not lawful, but a by-law to disfranchise the offender is good, and that the words were not opprobrious words. Mo. 411: pl. 563. Hill. 33 Eliz. Bab v. Clerk.

16. A constitution in London is, *that an apothecary that sells unwholesome drugs shall forfeit a certain pain*. The defendant sold unwholesome drugs in London, for which the chamberlain of London brought debt in London for the pain, and held maintainable there, by their by-laws and customs. Mo. 403. pl. 538. Hill. 33 Eliz. Wilford v. Masnam.

S. C. cited
ibid. 127.
b.—2 Inst.
47. cites
S. C. ac-
cordingly;
for no for-
feiture can
grow by let-
ters patents.

17. King H. 6. granted to the corporation of dyers in London, *power to search, &c. and if they find any cloth dyed with logwood, that the cloth should be forfeited*. Adjudged, that by the patent no forfeiture can be imposed of the goods of the subject [though it might by custom], and therefore in such case, fortior & potentior est vulgaris consuetudo quam regalis concessio. 8 Rep. 125. a. per Cur. cites Trin. 41 Eliz. C. B. Waltham v. Aulten.

—S. C. cited D. 279. b. marg. pl. 10.

Custom that
goods foreign
bought and
foreign sold
within the
liberty of the
city of
York, should
be forfeited,
and seizable
by the may-
or, sheriff,
and citizens,
and in the
prescription
they shew
that they
were mayor,
bailiffs, and
citizens in the
city time out
of mind, till the
1 R. 2. when
they were con-
stituted mayor,
sheriffs, and
citizens, and
held good. D.
279. b. pl. 10.
Mich. 10 & 11
Eliz. —Bendl.
21. pl. 36. S. C.
the pleadings.
—S. C. cited 8
Rep. 125. a. per
Cur. —S. C. cited
Arg. Mo. 581,
582.

18. The custom of London was, *that no person, not free of the city, shall keep any shop, inward or outward, for putting to sale any wares, &c. by way of retail, or use any trade, occupation, mystery, or handicraft for hire, gain, or sale, within the city*; a constitution was made pursuant to this custom, that *if any person should act contrary to such custom, he should forfeit 5 l.* Resolved, that there is a diversity between such custom in a city, &c. and a charter granted to the city, &c. to such effect; for it is good by way of custom, though not by way of grant, and therefore no corporations made within time of memory can have such privilege, unless it were by act of parliament. 8 Rep. 121. b. 124. b. 125. a. Hill. 7 Jac. the city of London's case, [alias Waggoner's case.]

19. A by-law was made, *to pay a mark a truss for hay, which should be sold unweighed*, and adjudged good. Lev. 16. Arg. cites 1652. B. R. Sutton's case.

20. The

20. The common council of the city of London made an order, *that no carts should work without licence from the company of woodmongers*, and that if they did, they might take and detain them until they shall conform to the government of the woodmongers. The court conceived, that the common council may depute woodmongers to make such law for the good of the city. Keb. 463. pl. 62. Hill. 14 & 15 Car. 2. B. R. Gavel v. Taffer.

Ibid. 496.
pl. 46.
Pasch. 15
Car. 2. B. R.
the S. C. it
was objected
that this
by-law was
contrary to
law, as re-
straining

private persons to work with their own carts with their own goods; sed non allocatur; for it must be intended of common working carts. Adjournatur.

21. A by-law for the better ordering of common was made at a court leet, and it being by a custom was held good by Wild and Archer J. contra Tirrell; and Bridgman Ch. J. before his removal to be Ld. Keeper, seemed of opinion, that it was good by custom, especially concurring with the consent of all the inhabitants. Cart. 177. 179. Hill. 18 & 19 Car. 2. C. B. The Earl of Exeter v. Smith.

22. Debt was brought upon a by-law by virtue of a charter of King Car. 2. enabling the plaintiffs to make by-laws, and this by-law was confirmed by the Ld. Chancellor, Treasurer, and Ch. J. viz. *that every mariner, within 24 hours after he should come to anchor in the river Thames, should put on shore all gunpowder (the weather permitting), upon pain of forfeiting 20 nobles*, and that the defendant had notice of this by-law, &c. and they being at issue upon the point of notice, the plaintiff had a verdict. Exception was taken, that it was not made by a sufficient authority, for the king himself cannot by his proclamation make such an universal law, and by consequence the patentees cannot; and all laws made by corporations have their obligation by consent of parties, or quasi by consent, but this cannot be as to places out of their jurisdiction. The court agreed the by-law to be a beneficial law in itself, and that the penalty is not too great, because the breach thereof is negligentia crassa, but upon the reasons given in the exception, they would advise. 2 Jo. 144, 145. Pasch. 33 Car. 2. B. R. Trinity-house v. Crispin.

23. A by-law was made by a new corporation, *that persons of the corporation elected to be stewards for the year ensuing, shall provide a dinner for the master, warden, and assistants on such a day, under the penalty of 10 l. or other less sum, to be levied by distress, or recovered by action of debt*. Exception was taken that the by-law was ill, because *not said that this dinner was appointed to the end that the company should assemble and consult of things beneficial to the corporation*; for by what appears it may be only luxury, and not for any benefit to himself or the company; and the by-law being unreasonable, the penalty is so too, and consequently not obligatory; quod curia concessit; and this by-law cannot be good in case of a new corporation, for the reason aforesaid; but had it been for the company to assemble and choose officers, or any

other thing for the benefit of the corporation, it had been well enough; but in case of old corporations by prescription, a by-law to make a customary feast has been held good; and therefore judgment was arrested. *Ld. Raym. Rep.* 113, 114. *Mich.* 8 *W.* 3. *Framework-Knitters' Company v. Green.*

24. Every by-law by which the benefit of the corporation is advanced, is good for that very reason, that being the true touchstone of all by-laws; per *Holt Ch. J. Carth.* 482. *Pasch.* 11 *W.* 3. *B. R. London City v. Vanaker.*

6 *Mod.* 123,
124. *S. C.*
adjudged ac-
cordingly...
1 *Salk.* 192.
pl. 5. *S. C.*
* [309]

25. By-law, that all strangers, coming into the port of London, should employ city porters to carry their goods, &c. was held naught; and per *Cur.* they may make a by-law that none but freemen shall be porters, * but to confine strangers to city porters is unreasonable; because if the city will appoint no porters, there is no remedy against the city; besides strangers cannot know who are city porters, neither can they compel them to serve them. 1 *Salk.* 143. pl. 7. *Hill.* 2 *Ann. B. R. Cuddon v. Eastwick.*

26. No by-law which is either unjust or unreasonable can ever be good; per *Parker Ch. J.* 10 *Mod.* 133. *Hill.* 11 *Ann. B. R.*

27. A by-law was made in London, that none but free-porters should intermeddle with the carrying or unloading of corn, salt, or sea-coal, or any other goods out of any barge, lighter, &c. between *Staines-bridge* and *Kendal* in the county of *Kent*, that are to be imported into the ports of London, under the penalty of 20s. for each offence, except in time of danger, and to save the losing of the goods. It was argued by *Mr. Peer Williams*, that it was a void by-law; but nothing more is reported. 10 *Mod.* 338. *Mich.* 3 *Geo.* 1. *B. R. Fazakerly (Chamberlain of London) v. Wiltshire.*

28. The bailiffs, &c. of *Chipping Cambden* had power to make by-laws, and made a by-law that no person inhabiting out of the borough, or not free of the borough, should set forth goods to sale, except victuals on market-days, in any market within the borough, &c. Upon demurrer this was resolved a void by-law; for without a custom, such a by-law to restrain persons not free of the borough from exercising a trade cannot be maintained; and judgment accordingly. *Comyns's Rep.* 269. pl. 148. *Mich.* 4 *Geo.* 1. *C. B. Parry v. Berry.*

29. A by-law was, that any person who exercises the trade of a joiner in the city of London, shall take his freedom in the company of joiners, and if summoned for that purpose, shall refuse or neglect to take it in that company, he may be fined for exercising such trade and disfranchised. The court adjudged this a reasonable by-law, it being made to prevent frauds in trade, by subjecting a man to the inspection of those who understand the same trade. 8 *Mod.* 267. *Trin.* 10 *Geo.* 1. *The King v. the Chamberlain of London.*

(A. 3)

[1.] **I** T is not necessary that the breach of a by-law made by the homage according to a custom, should be presented by the homage. D. 15 El. 322. 23. adjudged.]

[2. If a by-law be made by a custom, and that for want of observance, one shall forfeit, for which the lord shall distrain, and does not say whose cattle, scilicet, the cattle of the offender, yet it shall be intended; and therefore good. D. 15 El. 322. 23. adjudged, as it seems to me.]

(B) *Of what Things By-laws may be made, and of what not. [And who bound by them.]*

[1.] **I** T is a good by-law, (where there is a custom for the homage of a manor to make by-laws, *pro meliore ordine tenentium*, &c.) that none shall put his cattle in communi le sback antequam * *firmarius rector* [rectoria] of the manor, *pulsasset campanum in campanile ecclesie ibidem*, upon the pain of 10 s. (for it seems the reason is, that he is not lord, but hath common there with the other tenants, or no common, and so is indifferent) D. 15 El. 321. 23. adjudged upon demurrer against him, who was one of the homage who forfeited the by-law; but there, in the same case another demurrer commenced, and not resolved; but there it was objected, that this tended to the disinheretance of the commoner for ever, which was not reasonable.]

See (A. 2) pl. 10. in the notes. — S. C. cited; Arg. Mo. 584. — S. C. cited Cart. 178. * [310]

[2. By the custom, commoners may make a by-law, that they do not put in their cattle before such a day, and if they do, that they may be distrained; and though all the neighbours will not come, yet if proclamation be made to do it, they who make default, shall be bound as well as those that appear. Dubitatur, † 44 E. 3. 18, 19. whether it may be without the assent of all. But Brooke in abridging it, title Custom, 6. [says] that there is a diversity where it is in court, and where not, for it is used to bind in all bafe courts in England.]

† Fitzh. Arowre, pl. 74. cites S. C.

[3. Tenants of a manor may make a by-law to bind themselves, but not strangers. 21 H. 7. 40. (it seems to be intended by custom.)]

So of tenants of a leet. Bro. Prescription, pl. 40. cites S. C.

——— Fitzh. Prescription, pl. 67. cites S. C. & Trin. 14 H. 7. ——— Br. Customs, pl. 32. cites S. C. ——— And custom, that every one who makes an affray or bloodshed [in a leet] shall lose 20 s. is good; for it is *curia regis*. Br. Ibid. & Fitzh. Ibid. ——— So of distress in a leet, and sale of the distress. Br. Ibid. & Fitzh. Ibid. ——— And tenants of a vill may make a by-law touching their common, &c. and it shall bind them, but not strangers. Br. Ibid. and Fitzh. Ibid.

Inhabitants of a vill without any custom, may make ordinances and

by-laws for reparation of the church, or of a highway, or the like, which is for the public good; generally and in such case, the major part shall bind the rest without any custom. But if it be for their own private profit, as for the well ordering of their common of pasture, or the like, there they cannot make by-laws without a custom; and if there be a custom, yet the major part cannot bind the rest, unless it be warranted by the custom; for as custom creates them, so they ought to be warranted by the custom. 5 Rep. 93. a. Mich. 32 & 33 Eliz. B. R. Arg.

4. By-laws for payments and other works necessary for the making of highways, causeys, and the like publick things, shall bind without custom; but they ought always to be made by the major part; Arg. Mo. 579. cites 44 E. 3. per Finchden.

5. Where a parish is compellable to make a bridge, a by-law may adjust the proportion, how much the part of every one, who of right ought to make it, amounts to; Arg. Dal. 103, 104. pl. 42. cites 44 E. 3.

6. Corporations cannot make ordinances or constitutions without custom or charter of the king, unless for things which concern the publick good, as reparations of the church or common highways, or the like; Arg. 5 Rep. 63. a. cites 44 E. 3. 19. 8 E. 2. tit. Assise, 413. 21 E. 4. 54. 11 H. 7. 13. 21 H. 7. 20 & 40. & 15 Eliz. D. 322.

This statute does not corroborate any of the ordinances made by any corporation, which are so allowed and approved as the statute speaks, but leaves them to be affirmed as good, or disaffirmed as illegal by the law; and the sole benefit which the incorporation acquires by such allowance is, that they shall not incur the penalty of 40 l. mentioned in the act, if they should put in use any ordinances which are against the king's prerogative, or the * common profit of the people, &c. Resolved, 11 Rep. 54. b. Mich. 12 Jac. Taylors of Ipswich's case. Roll. Rep. 4. pl. 6. S. C. but I do not observe S. P. there. Godb. 252. pl. 351. S. C. but S. P. does not appear.

7. 19 H. 7. cap. 7. No masters, wardens, and fellowships of crafts or mysteries, or any rulers of guilds or fraternities, shall take upon them to make acts or ordinances in disinheritance or diminution of the prerogative of the king, or of other, or against the common profit of the people, except the same acts and ordinances be approved by the lord chancellor, treasurer, or chief justices of either bench, or three of them, or before both the justices of assise in their circuits, on pain of 40 l. Nor shall they make acts or ordinances to restrain persons to sue in the king's courts, or inflict any penalty or punishment on them for so doing, on pain of 40 l.

* [311]

8. By-laws made in a court-baron to bind strangers who are not tenants of the manor, are void; and so it is if the homage make the by-laws, and not all the tenants; and to make a by-law that they shall not put in their cattle into their severalties before such a day, is void. By-laws made to bind strangers, are not good, though they are made by the homage and by all the tenants, and though they are concerning such things whereof by-laws may be made. Sav. 74. pl. 151. says it was adjudged Mich. 25 & 26 Eliz.

9. Suit J. said, that if the custom of a manor be that the homage might make by-laws, it shall bind the tenants, as well freeholders as copyholders. But Tanfield, of counsel in the case, said, it is not a good nor reasonable custom; but such by-laws may be

be made by the greater number of the tenants, otherwise they shall not bind them.. Godb. 50. pl. 62. Mich. 28 & 29 Eliz. B. R. Anon.

10. In covenant, &c. upon an indenture of apprenticeship, the defendant pleaded a by-law in London by the common council there, where he was apprentice, *that if a freeman took the son of an alien to be apprentice, his bonds and covenants shall be void*; and adjudged no plea; for the common-council cannot make the bonds and covenants void; but they might have inflicted a fine and punishment on the master, for taking such an apprentice. Mo. 411. pl. 562. Trin. 37 Eliz. Doggerell v. Pokes.

OW. 69.
Dogrel v.
Perks; S. C.
adjudged ac-
cordingly.

11. Where cities, boroughs, &c. are incorporated by the name of mayor and commonalty, mayor and burgesses, bailiffs and burgesses, &c. and in the charters it is *prescribed that the mayors, bailiffs, &c. shall be chosen by the commonalty or burgesses, &c. yet if the ancient elections were by a certain selected number of the principal of the commonalty, &c. (commonly called the common council) and not by all the commonalty, &c. nor by so many of them as will come to the election, this was resolved to be good in law, and warranted by the charter*; for in every charter a power is given them to make laws and ordinances, and constitutions, for the better government and ordering of their cities, &c. by virtue whereof, and for avoiding popular confusion, they, by their common assent, ordained, &c. *that the election should be by such a select number*; and though this ordinance cannot be shewn now, yet it shall be presumed that such ordinance was made. 4 Rep. 77. b. Mich. 40 & 41 Eliz. at Serjeant's-inn in Fleet-street. The case of Corporations.

Jenk. 273.
pl. 93. S. C.
by all the
justices of
England.—
S. P. admit-
ted; but
says it is
otherwise as
to elections
to be made
of burgesses
for the par-
liament; for
such elec-
tion must be
by all; for
free elec-
tions for
members of
parliament
are pro bono
publico, and
not to be

compared to other cases of elections of mayors, bailiffs, &c. of corporations, &c. 4 Inst. 48, 49.

12. The corporation of butchers in London having a power to make by-laws, made a by-law *that no butcher, or person being a stranger, should sell any veal within the city of London, unless they dressed the kidneys thereof in such manner as the kidneys of sheep were dressed*; and if they did otherwise, then to forfeit 6 d. and if they refused to pay it, then to forfeit the veal. Then they shew the breach of this law, and so justify the taking the veal. Adjudged that this by-law was not good, because it was to restrain strangers, who are not bound to take notice of any private by-law made in a corporation, unless it is to suppress fraud, or any other general inconvenience used by foreigners, as corruption, or the like, in the sale of their meat, and then they ought to take notice thereof; and judgment accordingly. Bullst. 11. Hill. 7 Jac. Franklin v. Green.

13. By an act of the common council in London, for the ordering the companies of bricklayers and plaisterers, it was ordained *that the bricklayers should not plaister with lime and hair,*

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But Lea Ch.
J. said that
if it had ap-
peared in the

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but

return, that daubing with lime and hair appertains to the bricklayers, the ordinance is not good. Ibid. 396.

— 2 Roll.

Rep. 391.

S. C. & S. P.

by Lea

Ch. J.

2 Sid. 178.

Hill. 1659.

B. R. the

S. C. argued;

sed adjournatur.

— Keb.

32. pl. 84.

Pasch. 13

Car. 2. B. R.

Player v.

Barnardiston, S. C.

Procedendo

awarded,

nisi, &c. —

Ibid. 35.

pl. 95. S. C.

adjournatur,

Foster Ch.

J. absente.

— Ibid. 39.

pl. 106. S. C.

and a procedendo

was awarded per

tot. Cur. —

S. C. cited

6 Mod. 123.

in case of

Cuddon

(Chamberlain of London)

v. Provoft, and

says that all

the exceptions taken in the case of Bernardiston in Lev. 14, 15. were insisted on in the principal case, Hill. 2 Ann. B. R. and yet the court, after great consideration, awarded a procedendo according to the said case in Lev.

but with lime and sand only; and that plastering with lime and hair should belong to the plasterers; and that those who broke this order should forfeit 40s. to be recovered by the chamberlain, &c. It was objected that this was not a good ordinance, because it restrained the bricklayers in part of their trade, which was to plaster with lime and hair; but adjudged that this ordinance is not in destruction, but for ordering the traders, and no more in effect than a determination of a question between the companies. Palm. 395. Mich. 21 Car. B. R. Bricklayers v. Plasterers Company.

14. A by-law was made in London, that every foreigner who sells goods usually sold by weight, without bringing them to be weighed by a beam there called the king's beam, shall forfeit 13 s. 4 d. for every 500 weight, to be recovered by the chamberlain in the sheriff's court, and not elsewhere, and that no effoin, protection, &c. shall be allowed. It was objected, 1st, That it was unreasonable to compel the subject to bring every thing sold by weight to this beam; for they are frequently sold by the lump, and then no need of weighing; but it was answered that this by-law is founded on the custom of London, which is of such force, that it is good even against a negative act of parliament. 2dly, It was objected that this by-law was unreasonable, in respect of the penalty and inequality of it; for some goods may not be worth 13 s. 4 d. the 500 weight, and some of 500 weight may be worth 500 l. Sed non allocatur; for the penalty is only to enforce obedience; but had it been to pay a great sum for the weighing, it might be otherwise. 3dly, That it deprived the subject of privileges allowed by law, viz. of effoins, &c. sed non allocatur; for it is generally so in all by-laws. 4thly, That it restrains the actions to their own courts; sed non allocatur; for the facts and the persons are best known there. 5thly, That it does not appear that he had notice of this law, and a foreigner cannot take notice of it; but the court held that every one that will trade in London must take notice of the customs of the city, which are the laws of the city; and a procedendo awarded, nisi, &c. Lev. 14. Hill. 12 & 13 Car. 2. B. R. London (Mayor, &c.) v. Bernardiston.

the exceptions taken in the case of Bernardiston in Lev. 14, 15. were insisted on in the principal case, Hill. 2 Ann. B. R. and yet the court, after great consideration, awarded a procedendo according to the said case in Lev.

The record r cer-

tified the

cust: m of

London, as

to erecting

taverns; and

a person was imprisoned by the mayor and commonalty for erecting one in Birch-lane,

contrary to their order. Mar. 15. pl. 34. Pasch. 15 Car. Anon.

15. Though by-laws cannot restrain trades, yet they may prevent such excrescence of them as would make a nuisance, as the multitude of taverns and alehouses; per Cur. Sid. 284. pl. 18. Pasch. 18 Car. 2. B. R. in case of Player v. Jenkins.

16. A by-law, as to the place of particular trades, may be good, as to restrain a butcher from having a shop in Cheapſide, &c. Per Cur. Sid. 284. pl. 18. Paſch. 18 Car. 2. B. R. in caſe of Player v. Jenkins.

Cheapſide, it ought not to be for the great annoyance that would enſue. Mar. 15. pl. 34. Paſch. 15 Car. Anon.—So of a brewhouſe in Fleet-ſtreet, becauſe it is in the heart of the city, and would be an annoyance to it. Ibid.—S. P. by Twiſden J. Vent. 26. Paſch. 21 Car. 2. B. R.

As to ſetting up a butcher's ſhop, or a tallow-chandler's ſhop in

17. A by-law made by the company of ſilk-throwſters, that none of that company ſhould have above ſuch a number of ſpindels in one week. Reſolved that this is not a monopoly, but rather reſtraining a monopoly, that no one ſhould ingroſs the whole trade, but to provide rather for equality of trade, ſecundum quod eſt conveniens; and good, and judgment for the plaintiff. Lev. 229. Hill. 18 & 19 Car. 2. B. R. Freemantle v. Company of Throwſters.

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18. A libel was exhibited againſt the defendant in the vice-chancellor's court at Oxford, upon a by-law made by the univerſity, that whoever ſhould be taken walking in the ſtreets after 9 at night, having no reaſonable excuſe to be allowed by the proctor, &c. ſhould forfeit 40 s. one half to the univerſity, and the other to the proctor, &c. who ſhould take him, &c. and that the defendant was taken walking in the ſtreets after that hour, and reſuſed to give an excuſe, &c. Upon a motion for a prohibition, it was inſiſted that the defendant, being a townſman, the univerſity could make no by-law to bind thoſe who are not of their own body, unleſs by act of parliament, or expreſs preſcription. It is true they have an act of parliament anno 13 Eliz. by which their juriſdiction, privileges, and ſtatutes are confirmed; but whether this by-law, which was made ſubſequent to that ſtatute, viz. 7 Jac. was warranted by it or not, the court would not determine upon a motion; therefore propoſed that the libel ſhould be amended, and grounded upon the by-law 7 Jac. expreſsly, and then they would grant a prohibition, and the defendant might plead to it, and ſo the point come in queſtion. 2 Vent. 33. Paſch. 32 Car. 2. C. B. Univerſity of Oxford v. Dodwell.

19. On the 24th of April 1657 a by-law was made by the company of vintners in London, that for the time to come 3 l. 13 s. 4d. and no more, ſhould be paid by every liveryman upon his admiſſion into the ſaid office. It was inſiſted that this by-law was unreaſonable, and againſt law, and a grievance to the ſubject; but the court reſolved that were the ſum more or leſs, it would not make the by-law void, becauſe it is to bind only the members of that corporation; and when any man will agree to be of a company, he thereby ſubmits to the laws thereof; and this court will not take notice of any extravagancy of charges they lay upon themſelves, and it is convenient that the company ſhould have ſuch power, to keep up their reputation and the honour of the city

S. C. cited Arg. 5 Mod. 319. Mich. 8 W. 3. in CLARKE'S CASE, who reſuſed to take upon him the office of a liveryman of the company of vintners, though he was a citizen and free-

of

man of London, and therefore the case. Raym. 446. Pasch. 33 Car. 2. B. R. Taverner's

mayor and aldermen committed him to Fell the keeper of Newgate, until he should take upon him the said office. Holt Ch. J. said, that we ought to go as far as we can by law to support the government of all societies and corporations, especially this of the city of London; and if the mayor and aldermen should not have power to punish offenders in a summary way, then farewell the government of the city. But the exception which sticks with me most is, that it is not set out that Fell is an officer of the city; and indeed I think that he is not an officer of the city, quatenus a city, though I confess he is an officer to the sheriffs, as he keeps the county-gaol; but it ought to have appeared that he was committed to an officer of the mayor and aldermen. Clark was afterwards discharged per tot. Curiam, though all the court declared their opinion that the custom was a good custom, and was for the advantage of the good government of the city, and therefore they would always support it.

20. A by-law made by the master, wardens, and brotherhood of taylors in the city of Litchfield, *that every year, within one month after midsummer, they should chuse a master and 2 wardens to continue for a year; and that upon every day of election there should be a convenient dinner for the master and brothers, and that every one should pay his proportion, and if any brother should be absent, he should pay into the common stock so much as the master paid for his own dinner, upon pain of forfeiting 3s. 4d.* That anno 18 Eliz. those by-laws were approved by Sir Ed. Saunders, then Ch. Baron, according to the stat. 19 H. 7. and so brings the case within this by-law; and upon demurrer this was adjudged a good by-law upon the authority of WALLIS'S CASE, Cro. J. 555. [pl. 17. Mich. 17 Jac. B. R.] but that the breach of this by-law was not well assigned; for no notice was given, nor precise demand made of the same sum as the master paid; and without failing in this payment the defendant was not to incur the penalty, though absent from the feast; and judgment for the plaintiff. 2 Lutw. 1320. 1324. Pasch. 1. Jac. 2. Gee v. Wilden.

21. A by-law was made by the company of horners in London, *that two men appointed by them should buy rough horns for the company, and bring them to the hall, there to be distributed, &c. and that no member of the company should buy rough horns, within 24 miles of London, but of those two men so appointed, under such a penalty, &c.* After judgment by default it was moved, that this being a company incorporated within London, they have not jurisdiction elsewhere, but are restrained to the city, and by consequence cannot make a by-law which shall bind at the distance of 24 miles out of it; for, by the same reason, they may enlarge it all over England, and so make it as binding as an act of parliament; and for this reason it was adjudged no good by-law. 3 Mod. 158. Hill. 3 Jac. 2. B. R. The Company of Horners v. Barlow.

22. A by-law by the mayor, &c. of Guildford was, *that if any inhabitant of the said town should be chosen to the office of bailiff, and should refuse to take it upon him, he should forfeit and pay to the corporation 20l.* Exception was taken, because the by-law was that if any inhabitant should be chosen, whereas they cannot make by-laws to bind all the inhabitants of the town, but only the free-

Debt upon a
by-law,
(viz.) That
if any person
should be
chosen to be
bailiff of the

men and members of the corporation. The court held this and another exception taken to be incurable; and so in debt brought on the by-law, judgment was given for the defendant. 2 Vent. 247, 248. Mich. 2 W. & M. in C. B. The Mayor & probi Homines of Guildford v. Clarke.

city of Oxford, and should refuse to undertake that office, be should forfeit 10 l. to

the mayor, &c. and then sets forth, that the 30th of Sept. &c. the defendant was duly elected into the said office, he being a citizen and freeman of the said city, and that he refused to accept it, whereby the action accrued for the said 10 l. The declaration was adjudged ill per totum Cur. because a by-law to elect any person is void; for by this they may elect a stranger, and the alleging that he was duly elected will not cure it, because those words extend only to the manner of electing, but not to the persons to be elected; and though it is said that they elected the defendant, being a citizen and freeman, this is only the execution of the by-law, and shall not make the by-law good, which is void in itself; and it ought to be, if any citizen or burghers shall be elected, and refuse, &c. and not if any person, &c. 3 Lev. 293. Hill. 2 W. & M. in C. B. Mayor, &c. of Oxford v. Wildgoose.

23. Debt for 10 l. upon a forfeiture for breach of a by-law, which was that every person using the occupation of musick and dancing in the city of London, who shall have a privilege to be made free by patrimony, shall, at the next court of assistants of the company of musicians, after notice, accept and take the freedom of the said company; and that every person who hath served an apprenticeship to such mysteries, and not made free, and yet shall exercise his trade, shall forfeit 10 l. for every offence. This was adjudged a void by-law; for though the custom is, that whoever is free of the city must be free of some company, yet that custom does not oblige a man to be free of any particular company; for if it should, then though the defendant be intitled by birth to be free of such company, yet he must also be free of this, otherwise he cannot exercise this art, which is unreasonable. They may make him take his freedom, but cannot direct in what company. 5 Mod. 105. Trin. 7 W. 3. Robinson v. Grosccourt.

S. C. cited Arg. 8 Mod. 269. and says that this by-law exceeds the custom, and for that reason it was held void; and Ibid. 270. the Court said that in this case of Robinson v. Grosccourt, there was no company of dancing-masters, of which the

defendant might be made free.

24. The mayor, &c. of Bedford, made a by-law that no person who was not a freeman of that corporation, should set up any art, mystery or manual occupation within the corporation, under the penalty of 5 l. per day, to be paid to the chamberlain to the use of the corporation, to be levied by distress, &c. Exception was taken among others, that the by-law was unreasonable and against law, because it excludes all those who had served apprenticeships in the corporation; and of that opinion was the whole court, and judgment for the defendant; but they held that a custom to the effect of the said by-law would have been good. Lutw. 562. 564. Hill. 9 W. 3. Bedford (Mayor) v. Fox.

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25. Anno 7 Car. 1. a by-law was made, that no freeman of the city chosen to be sheriff of London shall be exempted, unless he will make oath that he is not worth 10,000 l. and bring 6 approved compurgators; and that upon proclamation made at Guildhall of the choice, and he being called to come and take upon him the office at the next court, and enter into

5 Mod. 438. S. C. and the by-law adjudged good; and that defendant had for-

feited the sum of 400l. by not complying with it. And an objection having been made, that supposing the person chosen to be a madman or a fool, &c. Holt Ch. J. in delivering the opinion of the court, answered that these incapacities are excepted, and that they are tacitly excepted out of all

into a bond of 1000 l. for that purpose, upon default shall forfeit 400 l. and if not paid within 3 months, shall forfeit 400 l. [100 l.] more, &c. It was insisted, that the choosing a sheriff is not within the custom of making by-laws, because the constitution of sheriff is by a charter of King James; sed non allocatur; for where a franchise is granted for the benefit of a body politick, they have an incident power to regulate that franchise for their publick benefit; and as every member has the benefit of the franchise, so he is compellable by penalties to undergo the charge to which the body politick is liable; and though the person chosen, may be indicted and fined for his refusal, yet that will not save the city franchise, and therefore it shall not hinder the forfeiture incurred by the by-law; and though it is the livery-men who are to be present at the election, and not the free-men, yet the free-men are represented by the livery-men, and he, that is represented, must take notice as much of the act of the representative body as if present; besides the election is a notorious thing, and there is a proclamation notifying it. 1 Salk. 142. pl. 1. Trin. 11 W. 3. B. R. London (City) v. Vanacre.

laws whatever, and therefore this by-law shall not extend to such persons; and that the by-law need not run, "provided that the party to be chosen sheriff, be not a fool or a madman," for it is excepted without it.—Carth. 480. S. C. and the by-law adjudged good.—12 Mod. 269. S. C. adjudged accordingly, and that a procedendo should go; but in the state of the by-law it is said, that "not having a reasonable excuse to be allowed by the lord mayor and court of aldermen, he shall forfeit 400 l. whereof 100 l. to be paid to the next sheriff that shall hold, and the rest to the use of the mayor and commonalty, to be recovered in the court of record held before the mayor and aldermen." And it being objected that this reasonable excuse is to be made to the mayor and aldermen, Holt Ch. J. answered, that whatever excuse he makes, if they allow it, the city is bound by it; and if they refuse to allow a reasonable excuse, it is not final; for it may be pleaded or given in an evidence, in an action brought for the penalty by the city; for it was not the meaning of the common council to put an arbitrary power in the lord mayor and aldermen, but is like the power given by the stat. 23 H. 8. cap. 5. to commissioners of sewers to do several things according to their discretion; but that must be understood of a legal discretion.—Ld. Raym. Rep. 496. S. C. and the court all held that a procedendo should be granted; and S. P. mentioned as to the not having a reasonable excuse, which was objected to be making them judges in their own cause; it was answered by Holt Ch. J. as above.—Carth. 483. the same point is started in the arguing for the defendant, though not mentioned in the state of the by-law there; and there Holt Ch. J. answered, that in such case the defendant may give it in evidence, upon nil debet pleaded in an action of debt brought for the forfeiture, and there the validity of the excuse may be tried by a jury.—5 Mod. 442. same objection made in arguing the case, though not mentioned there in the state of the by-law; and answered by Holt Ch. J. accordingly.

1 Salk. 193. pl. 5. S. C. and the same diversity; for a company or fraternity have not a local power of government.

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26. A difference was taken between a private corporation or company, and a great city or borough; for the former can only make by-laws to bind their own members, and touching matters that concern the regulation of the trade, or other affairs of the company; but great cities and towns, as London, Bristol, York, &c. can make by-laws for the better ordering and managing such town, and that law will bind strangers to the freedom of the town, while within such towns, and they are bound to take notice of such laws at their peril; and this diversity was agreed to by the court. 6 Mod. 123, 124. Hill. 2 Ann. B. R. Cuddon v. Estwick.

27. The *Hudson's-Bay company* are made a corporation by charter, and are thereby empowered to make by-laws for the better government

government of the company, and for the management and direction of their trade to Hudson's Bay. They may, by the by-laws, make restrictions upon their stock, viz. that it shall be liable, in the first place, to pay the debts due to themselves from their own members, or to answer the calls of the company upon the stock; for the legal interest of all the stock is in the company, who are trustees for the several members; per *Ld. C. Macclesfield*. 2 *Wms.'s Rep.* 207. pl. 55. *Hill*. 1723. *Child v. Hudson's Bay Company*.

28. So a by-law to detain and seize a member's stock for a debt due from a member to the company, is good; but this being a by-law to the prejudice of other creditors, it shall be taken strictly, and not extend to such debt as the member does not owe in law, but only in equity, as where it was owing to a trustee of the company; per *Ld. C. Macclesfield*. 2 *Wms.'s Rep.* 208, 209. *Hill*. 1723. *Child v. Hudson's Bay Company*.

29. But they cannot make by-laws by such a power, for carrying on projects foreign to the affairs of the company, as in relation to the projects and assurances; per *Ld. C. Macclesfield*. 2 *Wms.'s Rep.* 209. *Hill*. 1723. *Child v. Hudson's Bay Company*.

(C) How it may be made for the Recovery of the Penalty.

[1.] If a corporation that hath power by charter or prescription to make by-laws, makes a by-law, and a penal sum for non-performance thereof to be recovered by distress, &c. this is good. *Co.* 5. *Clark's case*, 64.]

See (A. 2) pl. 1. and the notes there. — S. P. seems admitted;

but if a by-law imposes a penalty upon a township, it is ill; for it ought to be upon every several person, and not to lay it upon all, and levy it upon any particular person. 3 *Lev.* 48, 49. *Mich.* 73 *Car.* 2. *C. B. Wells v. Cotterell*. — But a by-law to levy fines by distress and sale of goods is illegal and void; and judgment accordingly. 3 *Lev.* 281, 282. *Pasch.* 2 *W. & M.* in *C. B. Clark v. Tucker*. — 2 *Vent.* 182, 183. *S. C.* adjudged.

[2. So if it be limited to be recovered by action of debt. *Co.* 5. 64.]

[3. So the penalty may be recovered by action of debt, without limitation. *Co.* 5. 64.]

[4. If an ordinance be made by the common-council in London, that a certain thing shall not be done upon pain of forfeiture of a certain sum, to be recovered by the chamberlain of London by action of debt, this is good; because the chamberlain is their public officer. *Co.* 5. *Chamberlain of London*, 63. per *Curiam* resolved.]

5 *Rep.* 61. b. 63. b. *Mich.* 32 & 33 *El.* B. R. the *S. C.*

[5. If a corporation that hath power by charter or prescription to make by-laws, makes a by-law, and limits a penal sum to be forfeited for non-performance; this cannot be levied by distress, without

Fol. 367.

A by-law without a prescription to do it, or limitation by the by-law so to do
 was made by Co. 5. Clark, 64. admit D. 15 El. 321. 23.]
 of a court baron, that so many inhabitants within the manor should be chosen annually by the homage to
 serve as field-reeves within the manor, and that if any so chosen should refuse, he should forfeit 10l.
 which should be levied by distress. In trespass for taking a distress, the defendant justified; but excep-
 tion was taken, because he had not prescribed to levy the penalty by distress; but after several argu-
 ments, it was adjudged to * be well enough; because the prescription being for the by-law, and the by-
 law itself ordaining a distress, it is the same thing as if the prescription had appointed the distress; and
 judgment for the defendant. Ld. Raym. Rep. 91. Trin. 8 W. 3. C. B. Lambert v. Thornton.

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12 Mod.
 669. Hill.
 23 W. 3.
 the City of
 London v.
 Wood, S.C.
 at Guild-
 hall, coram
 Holt, Ward,
 and Hatfield,
 and held ac-
 cordingly;
 with the ar-
 guments of
 the judges at
 large.

6. The mayor and commonalty of London may make a by-law,
 and limit the penalty to be forfeited to themselves, because there is no
 way to enforce obedience but by punishment, which must neces-
 sarily be either pecuniary or corporal, as imprisonment, which is
 not legal, unless there be a custom to warrant it; and the direct
 end the law seeks, is no more than obedience, and they might sue
 for the penalty in the court of the mayor and aldermen if the
 mayor could be severed and held before the aldermen, which he
 cannot, for it is his court, and the stile of it is coram majore, so
 that he is an integral part, and therefore he would be both plain-
 tiff and judge; resolved by Holt Ch. J. Ward Ch. B. &c. 1 Salk.
 397. pl. 3. at Guildhall, Mar. 2. 1701. Wood v. the Mayor and
 Commonalty of London.

(D) Pleadings.

Mo. 75. pl.
 205. Scar-
 ling v.
 Criet, S.C.
 adjudged;
 and there
 another rea-
 son is given,
 viz. because
 that is not
 alleged that
 the by-law
 was made,
 ex assensu
 omnium te-
 nentium ne-
 que majoris
 partis, but
 ex assensu
 aliorum te-
 nentium.

1. **I**N 2d, deliverance, a custom of a manor was set forth for mak-
 ing of by-laws, and that a by-law was made that no tenant,
 &c. of the manor from thenceforth should keep his cattle within the
 several fields of the manor by by-herds, nor could put any of the oxen
 called draught oxen there before St. Peter's Day, upon forfeiture of
 20 s. But judgment was given against the consuance, because he
 pleaded, that it was presented coram seclatoribus, and does not shew
 their names. 2dly, The penalty appointed by the by-law was 20 s.
 and he shews that it was abridged to 6 s. 8 d. and so the penalty
 demanded, and for which the distress was taken, is not maintain-
 ed by the by-law; and a pain certain ought not to be altered.
 3dly, He shews that it was presented that the plaintiff had kept
 his draught oxen, whereas he ought to have alleged the same in
 matter in fact, that he did keep, &c. 3 Le. 7. pl. 21. Mich. 7
 Eliz. C. B. Scarning v. Cryer.

2. Where there is a custom in a manor for the homage to make
 by-laws when necessity requires, whether it ought to be set forth that
 there was necessity for it at the time when made? See 3 Le. 38.
 pl. 63. Mich. 15 Jac. the arguments in Ld. Cromwell's case.

3. By

3. By a custom for the master and company of shoemakers of the city of Exeter to make by-law, they made a law, that no person, not being of their fraternity, should make or offer to sell, &c. shoes within the city or county of Exeter, or any other wares pertaining to the said art, under pain of forfeiting to the master, &c. for every such offence, such sum as should be assessed by the master and wardens, &c. not exceeding 40 s. and if he shall refuse to pay the same, upon proof made of the breach of this order, it should be lawful for the master, &c. to distrain; and so shews, that the plaintiff, being an inhabitant in the city of Exeter, and no brother of the society, did make shoes, &c. and that a fine of 33 s. 4 d. was imposed on him for the said offence, of which he paid part, but refused to pay the rest, and thereupon the defendant distrained, &c. Upon demurrer to this plea it was adjudged ill, because the defendant had exceeded the custom alleged in the extent of the by-law; for the custom was, to make by-law for the better government of the company of shoemakers of the city of Exeter; but the by-law is, that none shall make or sell any shoes within the city or county of Exeter, which is not warranted by the custom, and in this likewise they have exceeded their power in the thing prohibited, for it is not to restrain a man from using the art of a shoemaker in the city, but it is to restrain them generally from making shoes, and that extends to making shoes for himself, which is void. It is void likewise as to the restraining persons from doing many things which are to be done by other artificers, as lasts, which are to be made by the last-maker, and awls by the smith, &c. The penalty likewise imposed by this by-law is not warranted by the custom or by-law, because that ought to be expressed, that the court might be judge of the reasonableness of it, but here no certain penalty is set down, for that is left to the discretion of the master and wardens, &c. And, lastly, the defendants have distrained before their time, for they ought not to do it before refusal to pay, and proof thereof made, which ought to be by verdict, and not before the master and wardens. Adjudged that the plea was not good. Bridgm. 139. Trin. 16 Jac. Wood v. Searle. [318]

4. A by-law was made, that every one elected to the livery of the company of leatherfellers, who had not been guardian of the yeomanry before, should pay to the use of the society 25 l. And in debt the plaintiffs shew the election of the defendant to be one of the livery, with apt averments and due notice given to him. The defendant pleaded the custom of the city of London, that no man, not being free of the city, can be elected to the livery of any society, and that he is not free. The plaintiffs deny the custom, et hoc parati sunt verificare. The defendant demurred, and shewed, that the plaintiffs ought to conclude their plea to the country; but Curia contra; because the custom ought to be tried by the certificate of the recorder; and judgment for the plaintiff. 2 Jo. 149. Pasch. 33 Car.

33 Car. 2. B. R. Leatherfellers Company of London v. Becon.

5. The *alleging a by-law to be made by the steward of the manor with the consent of the homage is ill*; for the by-laws ought to be made by the homage; per tot. Cur. 3 Lev. 48. Trin. 33 Car. 2. C. B. Wells v. Cotterell.

6. In replevin the *defendant justified under a custom to make by-laws, and to distrain for the penalty*. The plaintiff replied, *de injuria sua propria absque tali causa*, &c. Upon a demurrer this replication was held good by all the justices, præter Levins, *without a particular traverse of the custom*. 3 Lev. 48. Trin. 33 Car. 2. C. B. Wells v. Cotterell.

For more of By-Laws in general, see **Common, Corporation, Courts, Trade**, and other proper titles.

Canons.

Canons.

(A) Good. And the Force of them.

1. **I**F a canon be *against the common law* it is void. Arg. Roll R. 454: cites 11 H. 4. 7 H. 8. and that the common law shall not be altered by the canon law, cites 5 Rep. Cawdry's case. Godb. 163. pl. 228. Pasch. 8. Jac. C. B. the S. P. by

Coke Ch. J. in case of *Candlish v. Plomer*.

2. 25 H. 8. cap. 19. §. 1. Enacts, that *the clergy shall not presume to claim, or put in ure, any constitutions or canons; nor shall enact, promulge, or execute any such canons or ordinances in their convocations, (which always shall be assembled by authority of the king's writ) unless the clergy may have the king's royal assent and licence to make, promulge, and execute such canons and ordinances, upon pain of every one of the clergy doing contrary, and being thereof convicted, to suffer imprisonment, and make fine at the king's will.*

3. S. 2. No canons shall be made or put in execution within this realm by authority of the convocation, which shall be repugnant to the king's prerogative, or the customs, laws, or statutes of this realm.

4. The king, without parliament, may make orders and constitutions to bind the clergy, and may deprive them if they obey not; but they cannot make any constitutions without the king. Cro. J. 37. per omnes J. &c. Trin. 2 Jac. in pl. 13. 4 Inst. 323. cap. 74.

5. Resolved, that the canons of the church made by the convocation and the king, without parliament, shall bind in all matters ecclesiastical as well as an act of parliament; for they say, that by the common law every bishop in his diocese, archbishop in his province, and convocation house in the nation, may make canons to bind within their limits. When convocation makes canons of things appertaining to them, and the king confirms them, they shall bind all the realm. Mo. 783. pl. 1083. Trin. 4 Jac. in canc. with the assistance of the 2 chief justices and chief baron. Bird v. Smith, The convocation, with the licence and assent of the king under the great seal, may make canons for regulation of the church, and that as well concerning

laicks as ecclesiastics; per Vaughan Ch. J. 2 Vent. 44. in case of *Grove v. Dr. Elliot*.—And says, that so is *Lindwood*; and if in making new canons they confine themselves to church matters, it is all that is required of them. Ibid.

6. Canons made by the pope and allowed here, yet unless they were allowed by parliament were not good. Arg. Roll R. 454. per Dr. Martin, Hill. 14 Jac. in the exchequer-chamber.

7. Where there is a special custom for the *choosing churchwardens*, the canons (viz. that the parson shall have the election of Vol. IV. C 6 Jo. 439. pl. 4. Trin. 15 Car. B. R.

Evelin's case, S. P. held accordingly. — Mar. 22. of one) cannot alter it, especially in London, where the parson and church-wardens are a corporation to purchase lands and demise their lands. Cro. J. 532. pl. 15. Pasch. 17 Jac. B. R. Warner's case.

pl. 50. Anon. but is S. C. — Noy 139. Mich. 4 Jac. C. B. Anon. S. P. accordingly, and Coke Ch. J. said, that the canon is to be intended where the parson had nomination of a churchwarden before the making of the canon. — Cro. J. 670. pl. 9. Trin. 21 Jac. B. R. Jermyn's case, it was held a good custom for the parishioners to *choose a parish clerk*, and that the canon cannot take it away. — Godb. 163. pl. 223. Pasch. 8 Jac. C. B. Candlish v. Plomer, S. P. accordingly.

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8. The canons are the ecclesiastical laws of the land, but shall not *bind* here unless received, as appears by stat. 25 H. 8. 21. and the stat. de bigamis, and the stat. of Merton, as to one born before marriage, though by the canon he was legitimate, yet by our law he is not; per cur. Jo. 160. Trin. 3 Car. B. R.

9. The canons made 1571 in queen Elizabeth's time, and 21 Jac. being confirmed by Q. Eliz. and K. Jac. are good by the *stat.* 25 H. 8. so long as they do not impugn the common law or prerogative of the king, and before the 25 H. 8. 19. the ecclesiasticks might make canons without the king, but are by that statute restrained; but since that statute they may make canons with the assent of the king, so long as they are not contrary to the laws of the land, or derogatory of the king's prerogative. 2 Lev. 222. Trin. 30 Car. 2. B. R. Cory v. Pepper.

Ld. Raym. 10. Ecclesiastical persons are subject to the canons. Those of 1640 have been *questioned*, but no doubt was ever made as to those of 1603; per cur. 1 Salk. 134. Pasch. 11 W. 3. B. R. the Bishop of St. David's v. Lucy.

But undoubtedly the canons of 1603 do not bind the laity; by the ch. justice. 2 Barnard. Rep. in B. R. 353. Mich. 7 Geo. 2.

11. All the *clergy are bound* by the canons confirmed only by the king; but they must be confirmed by the parliament to bind the laity; per cur. Carth. 485. Pasch. 11 W. 3. B. R. The Bishop of St. David's v. Lucy.

12 Mod. 218. S. C. & S. P. per Holt Ch. J. — Canons *oblige not the laity* without the consent of the civil legislative power. 2 Salk. 412. Hill. 1 Ann. B. R. Matthews v. Burdett. — Ibid. 672. S. C. — Not without an act of parliament; per Ld. Keeper, Mich. 1700. Wms.'s Rep. 32. Cox's case. — Resolved that the canon law obliges not the subjects of this realm, unless it be incorporated into the common law by act of parliament, or received time out of mind, &c. and then it becomes part of the common law. Ld. Raym. Rep. 7. Trin. 6 W. & M. in case of Philips v. Bury.

2 Salk. 672, 673. S. P. in S. C. 12. In the primitive church the laity were present at all synods. When the empire became christian, no canon was made without the emperor's consent; the emperor's consent included that of the people, he having in himself the whole legislative power, which our kings have not; therefore if the *king and clergy make a canon, it binds the clergy in re ecclesiastica*; but it does not bind *laymen*; they are not represented in convocation; their consent is neither asked nor given. 2 Salk. 412. pl. 2. Hill. 1 Ann. B. R. Matthews v. Burdett.

13. No canons, *since* 1603, can proprio vigore bind laymen; per Holt Ch. J. 6 Mod. 190. Trin. 3 Ann. B. R. in case of Britton v. Standish.

But he agreed that more ancient canons might. Ibid.

14. Declaration in prohibition, which sets forth the statute 7 & 8 W. 3. cap. 35. and further, that lay-people are not punishable by canons; that the plaintiffs, at the promotion of the defendant, were articted against in court christian, for that the plaintiffs were clandestinely married without publishing banns or licence, and between the hours of 1 and 8 in the morning, contrary to the canons. Then alleges that, if any, this is a temporal offence, and punishable by the said statute, and the usual averment of proceeding in the spiritual court contrary to the prohibition of this court. The defendant by plea denies he has proceeded in the spiritual court, prout; and that the canons are in force to bind lay-people, &c. Demurrer to the plea, and joinder in demurrer. Now this term Ld. Hardwicke Ch. J. pronounces the resolution of the court. The questions that have been made in this case were, first, whether by the canons of 1603, lay-persons are punishable? 2dly, If lay-persons cannot be punished by those canons, whether the ecclesiastical court has any jurisdiction in this case by virtue of any ancient canons and constitutions? 3dly, Supposing they have a jurisdiction, whether it is not taken away by the operation of stat. 7 & 8 W. 3.? I shall subdivide these questions into 2; first, Whether the canons of 1603, relating to clandestine marriages, do affect the present case? 2dly, Supposing lay-persons are included in the words of those canons, whether they are binding against laymen? The 62d canon only relates to the punishment of the minister who marries persons without a faculty or licence. The 101, 102, 103 canons relate to the manner and conditions of granting licences, and that the marriage shall be in the parish church or chapel where one of the parties dwell, and that between the hours of 8 & 12 in the forenoon. The 104th contains an exception, as to parents consent, to those in a state of widowhood; and that every licence that has not the preceding requisites shall be void, and the parties marrying by virtue thereof shall be subject to the punishments appointed for clandestine marriages. None of these canons, except the last, affect the persons contracting, and that is with regard to those who marry under colour of an irregular licence, which is void; but that is not the present case; for here is no licence nor publication of banns; so these canons do not extend to lay-persons in the present case. But 2dly, Supposing they had a jurisdiction in the present case, whether the authority by which these canons were made can bind the laity? These canons are confirmed by the king under the great seal. With regard to this question, there is some variety of opinions in our law-books; but I always understood that the canons of 1603 did not bind the laity, for want of a parliamentary authority. It was admitted by Serj. Wright, that these canons did not bind the laity proprio vigore, but that they were declarative of ancient canons

MS. Rep. Mich. 1736. Middleton and his wife v. Croft.

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which had immemorially been received and incorporated into the law; and we are all of opinion, that the canons of 1603 do not proprio vigore bind the laity, though many provisions are contained in these canons, which will bind the laity as declarative of the common law. The ancient councils which composed these canons in the first ages of the church, were a mixed assembly, consisting partly of lay and partly of ecclesiastical persons; but it is uncertain how they were convened, whether by election or otherwise; and Spelman, though a learned work, does not settle it. But by the fundamental principles of our constitution, no new law can be made but by the united authority of parliament, Parl. Rot. H. 6. 12 Co. 74. That the parliament consists of the 3 estates of the realm, 4 Inst. And that the whole commons are represented in parliament. By reason of this it is said that every person's consent is to every act of parliament; but in the constituting and making of canons there is only the sanction and authority of one part of the legislature, viz. the king. The original obligation of acts of parliament did not arise from the actual consent of every person, but from an implied consent; for it is an actual representation of the whole people. The individuals could not with convenience assemble, therefore by necessity it was qualified, and made a representative body. It is a new notion that the people are represented in convocation, and is contrary to the writs of convocation, which is convocari facias totum clerum vestrius provincie, which imports that the clergy are assembled together, and only the clergy of either province are either present in person or by representation. 4 Inst. 322. There is indeed a difference between the old canons and the new provincial canons. The canons in the first ages of the church bound all the subjects of the empire, as well lay as ecclesiastical; but the binding force over laymen arose because the supreme legislative power was vested in the emperor, who gave the force and authority to such laws. Justinian's Inst. 1 lib. f. 16. the whole power of making laws devolved upon the emperor. The reasoning in the case of † MATTHEWS against BURDETT, 2 Salk. 673. is of great weight, though no resolution was ever given, and the reason was, one of the parties died. It was insisted at the bar, that the consent of the people was included in the authority of the king to confirm canons; but that cannot be; for where there is an authority to make laws of a binding force, there is a like authority to impose taxes: these things are inseparable; but it was never allowed that the king, by virtue of his sole authority, could impose taxes, and the clergy could never charge any persons with any burthens or impositions but themselves. The clergy in convocation cannot create a new fee, and yet to suppose they can make a law binding upon the laity, is absurd. The best rule to judge of the validity of their canons, is from the constant usage since the reformation. At that time, upon the change of the national religion, great alterations were made as to the form of prayer, and the rites and ceremonies to be observed in the reformed religion. All these alterations were established by act of parliament.

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† 807. pl. 12.

parliament. The clergy did not think their own constitutions, though in a matter of ecclesiastical nature, were binding upon the laity without the aid and assistance of the whole legislature of the realm. It was insisted at the bar, that the reason of their acts of parliament was to enforce these alterations by civil sanctions and temporal penalties: that indeed was one, but not the only reason; for even all the regulations at the time of the reformation, even the most minute, were established by act of parliament. It was asserted at the bar, that the power of the convocation of making law is co-extensive to their jurisdiction. This is carrying it much too far; for should this argument prevail, then, in all matters in which the ecclesiastical court has jurisdiction, new laws and measures of justice might be instituted: as the ecclesiastical court has jurisdiction of marriages, they might, by laws of their own making, alter the degrees of consanguinity, and make those marriages unlawful which are now lawful: by this means the common law relating to heirship might be changed. The same holds good with respect to tithes, and to every part of their jurisdiction; so that if this objection was to be allowed in its full latitude, it would produce very pernicious consequences, and induce innovations upon the law. If this power had been vested in them, they need not have resorted to parliament to have the bastard eigne legitimate according to the canon law, when espousals were had afterwards, but by their own authority they might have done it; and that memorable saying of the lords, *nolumus leges Angliæ mutari*, would have been unnecessary, 2 Roll Abr. 586. pl. 35. The case in Roll Abr. 909. pl. 5. letter (I) seems a strong case for the validity of these canons; but yet, when considered, is of no authority. It is the canon relating to what sum shall be deemed *bona notabilia*, which fixes it to 5 l. and the case says, it seems that this canon has changed the law, if that was otherwise before; inasmuch that the grant of administration belongs to the ecclesiastical law, and our law but takes notice of their law in that, and for that they may alter it at their pleasure; NEEDHAM'S CASE. The same case is reported in 8 Rep. but not a word of this there mentioned. Perkins, pl. 489. But this case, as reported by Roll, is contrary to law, and no foundation for such an opinion. There is indeed a positive declaration of law with regard to this matter; but we find that it has been the parliamentary notion, that no power of making laws, binding upon the subject, is vested in any but themselves. In the statute 25 H. 8. cap. 19. it is recited, That whereas divers constitutions and canons, which heretofore have been enacted, be thought not only to be much prejudicial to the king's prerogative, and repugnant to the laws and statutes of this realm, but also much onerous to his highness and his subjects; therefore the said constitutions are committed to the examination of 32 commissioners, to abolish or retain such as they shall think worthy. This statute, with regard to the power of appointing commissioners, was continued 35 H. 8. cap. 16. It is to be observed by this act, that both the king and clergy thought

Par. 1. & 2.

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it necessary to have the concurrence of parliament in the abrogating or retaining those ancient canons. 2dly, That whatever alterations happened in the canon law by the act of those commissioners have their binding force by virtue of this act of parliament; and therefore whatever of the canon law remains, that is not contrary to the statutes and usages of this realm, are confirmed by act of parliament. As to judicial opinions, the case of 20 H. 6. 13. is a strong authority with our opinion. Brooke, tit. Ordinary 1. which is a true state of it. Newton J. says the ordinary has power to make holydays and fasting-days, and to make constitutions provincial to bind the clergy, but not to bind the temporality; nor can they allow or disallow the king's letters patents in their convocation. E. 3. 44. b. Catesby there argues, that the acts of convocation are as binding upon the clergy as acts of parliament to the laity. Every abbot, prior, and other ecclesiastical person, is either a privy or party in convocation. The case of THE PRIOR OF LEEDS, before, is not mistaken by Brooke. The old edition is *le temporal*. Newton J. gives his opinion at large, and says that the power of the convocation does not bind the temporal rights of the clergy themselves. It appears from Mo. 755. 2 Cro. 37. that the king may make ordinances without parliament to bind the clergy, and if they obey not, may by his commissioners deprive them. This is the ancient prerogative of the crown, as appears by those books; therefore the convocation, which is by the assent and confirmation of the king, may make canons to bind the clergy; and so is the case of THE BISHOP OF ST. DAVID'S v. LUCY, 1 Salk. 134. Carth. 485. where it is said by Holt, that all the clergy are bound by the canons confirmed only by the king; but they must be confirmed by the parliament to bind the laity; and the notes of Raymond and Eyre Ch. J. agree with the report in Carth. In the case of BRITON v. STANDISH, * Mo. Ca. 190. Holt, agreeable to his former opinion, held that no canon, unless anciently received, though in full convocation, can proprio vigore bind laymen; and of the like opinion was the court of C. B. in the case of DAVIS, Mich. Term. 5 Geo. 1. which was upon teaching school without licence in prohibition. In opposition to this opinion has been cited the case of † BIRD v. SMITH, Mo. 783. where it is said that the canons of the church made by the convocation and the king, without parliament, shall bind in all matters ecclesiastical as well as an act of parliament. The case in itself is of a very extraordinary nature, and such as no relief would be given to in chancery at this time; besides, it is said in the case, that every bishop in his diocese, archbishop in his province, may make canons to bind within their limits. Now there is no colour for this. But further it is not expressly said that the canons will bind laymen; upon the whole, it is not of very great authority. The next opinion is † Vaugh. 327. where it is said, a lawful canon is the law of the kingdom as well as an act of parliament. This is only a loose saying, and not of any great weight. The next case is § GROVE AND ELLIOT, 2 Ventr. 41. where Vaughan says, that the canons of

* 6 Mod.—
See Prohibition (C) pl. 10.

† At Prerogative (I. f) 6.

‡ In the case of Hill v. Good.
§ At tit. Prohibition (C) pl. 5.

of 1603 are of force, though never confirmed by act of parliament; that the convocation, with the licence and assent of the king, under the great seal, may make canons for the regulation of the church, and that as well concerning laicks as ecclesiastical persons; and so is Linwood. This was upon a motion without much consideration, and Tyrrell J. was of a contrary opinion, the other two judges were silent about it, and this was of a point not in judgment before them, and only the single opinion of Vaughan. The next question is, Supposing lay persons cannot be punished by the canons of 1603, then, whether the ecclesiastical court has any jurisdiction, with regard to the present question, by the ancient canons? And we are all of opinion, that with regard to the marrying without licence, or publishing the banns, they have such jurisdiction; that by the statute 25 H. 8. cap. 21. concerning impositions that used to be paid to the see of Rome, in the preamble, that the king is bound by no laws but such as the people have taken at their free liberty, by their own consent, to be used among them, and have bound themselves, by long use and custom, to the observance of the same; and in s. 8. that all children, procreated after solemnization of any marriage to be had by virtue of such licences, shall be reputed legitimate. That in the statute 35 H. 8. cap. 16. authority is given to the king, during life, to name 32 persons to examine all causes, and to establish all such laws ecclesiastical as shall be thought convenient; from hence it follows, that many canons that had been immemorially used, and not abolished by those commissioners, are part of the common law, and as such have their binding force. Ch. J. Hale in a manuscript says, and very truly, that it was the civil power that gave the ecclesiastical jurisdiction its life and vigour. And it appears from Linwood, that clandestine marriages were punished by canons which had been received, and that the punishment of a clergyman for marrying persons without licence, or publishing banns, was suspension per triennium. In the case of * MATTINGLEY v. MARTIN, Sir Will. Jones, 259. it was expressly determined in the 2d point of that case, that if any marry without publishing banns or licence, which dispenses with it, they are citable for it in the ecclesiastical court, and no prohibition lies. This is an authority in point with our opinion upon this question. The 3d question, Whether this jurisdiction is taken away by stat. 7 & 8 W. 3. and is only now of temporal cognizance? As to this, we are all of opinion that this statute has not taken away any ecclesiastical jurisdiction that was subsisting before; but that, notwithstanding, the spiritual court may proceed to inflict censures for clandestine marriages. In the case of † COREY v. PEPPER, 2 Vent. 222. a consultation was granted, that was for teaching school without a licence; and suggested the statute of uniformity, 13 Car. 2. which gives a penalty of 5 l. in such case. † Carth. 464. is contrary to Corey and Pepper; and in Matthews and Burdet no resolution; but in the case of teaching school without a licence, the 5 l. is inflicted as a punishment for the same offence; but in the present case the 10 l. is not inflicted as

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* At Prohibition (F) pl. 67.

† At Prohibition (U) pl. 25.

‡ Chedwick v. Hughes. See Schoolmaster (A) pl. 4.

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a punishment for the offence of clandestine marriages, but collaterally for the better securing the revenue of the crown, and therefore it does not contradict the maxim *nemo debet bis puniri pro uno delicto*; for the prosecution upon the statute is as the statute *de articulis cleri* mentions it, *diverso intuitu ventilatur*; in which case the ecclesiastical jurisdiction is not taken away; and even in acts of parliament a double punishment is inflicted *diverso intuitu*, as in the statute of 18 Eliz. concerning the reputed fathers of bastards, the offender may be punished for the crime, and also may be proceeded against to indemnify the parish. The argument generally used when the temporal power has annexed a punishment to such an offence, that the spiritual jurisdiction is taken away, is, that their proceedings are *pro salute animæ*; but those are meer words; for the proceeding is really to punish the offender for the crime, and to have effect as such. Besides, it may be argued, that marrying without publishing banns is confirmed by act of parliament; for the statute of uniformity confirms the rubrick, and this is therein contained. Supposing this pecuniary penalty in the stat. 7 & 8 W. 3. would have taken away the ecclesiastical jurisdiction in this respect, yet it is considerable whether this act of parliament shall repeal a power given them by a former act of parliament; for in this act of 8 W. 3. there are no negative words, so both the acts may stand together. There is no notice taken of this statute of 8 W. 3. of the act of uniformity. Upon the whole, we are of opinion that the ecclesiastical court has a jurisdiction to proceed to impose ecclesiastical censures upon any persons marrying without publishing banns or licence; therefore the prohibition must stand as to the plaintiff's not being married between the hours of 8 & 12, that being singly enjoined by the canons of 1603; and that a consultation is awarded as to the residuc. It is necessary to grant a prohibition as to that; for the ecclesiastical judge may make it a clandestine marriage singly upon that point, viz. not marrying between the hours of 8 & 12.

For more of Canons in general, see *Prerogative* (Y. c) *Prohibition*, and other proper titles.

Certainty in Pleadings.

(A) Requisite in what Cases.

1. **P**LEADINGS of every statute, grant, pardon, custom, &c. in which is exception, foreprize, condition, or thing amounting to it, these shall be pleaded expressly. Br. Pleading, pl. 124. cites 8 H. 4. 7.

2. Plea

2. Plea in abatement of the writ shall be certain to every common intent; per Juin & Gascoign. And it is said elsewhere that plea in bar suffices, if it be good, to one common intent; but declaration shall be good to every intent. Br. Presentation, pl. 32. cites 14 H. 6. 24.

3. In entry in nature of assise, the tenant said that J. N. was seised and infeoffed him, and after disseised him, and infeoffed the plaintiff; upon which the tenant entered. The demandant said, that fine was levied between him and this same J. N. of the same land, by which J. N. acknowledged to him, &c. before which fine the tenant had nothing of the feoffment of J. N. and did not traverse the disseisin nor the feoffment; and held only argument to prove that the tenant disseised the demandant; whereupon he said that the fine was levied as above, by which he was seised till by the tenant disseised, absque hoc that the tenant any thing had of the feoffment of J. N. before the fine. Yelverton said J. N. infeoffed him before the fine, prift, and so to issue. Br. Traverse per, &c. pl. 86. cites 21 H. 6. 12.

4. In assise of rent the plaintiff made title to the rent by agreement made to P. by which the party granted the rent out of the manor of B. to be paid at S. dated the day, year, and place abovementioned, where three places were named; and by the best opinion the pleading is not good, for the uncertainty. Quod nota. Br. Pleadings, pl. 156. cites 32 H. 6. 15.

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5. In annuity of 10s. the plaintiff counted by prescription. The defendant said that he held the advowson of B. of him by the 10s. which is the same rent now in demand; judgment of the writ, and he was put to answer over; for it is only argument. Br. Traverse per, &c. pl. 23. cites 33 H. 6. 27.

6. In præcipe quod reddat the tenant pleaded a release of the demandant by name, of all the land which he had of the gift of one R. He ought to aver of what land R. was seised, and released, &c. Br. Pleadings, pl. 92. cites 2 E. 4. 29.

7. But where a man releases all his right in 3 acres in B. called G. which heretofore were H.'s, there he need not plead such averment; for he has given the land a name, and therefore there the release is good, though the land was never H.'s; and so a diversity between generality and specialty. Ibid.

8. If in assise of an office a man pleads admittance to the office, he need not say that the office is void by resignation, &c. but 'tis sufficient to say that the office voided, and A. B. was admitted by the justices of bank. Br. Pleadings, pl. 122. cites 8 E. 4. 22.

9. If a man be bound upon condition to suffer J. N. to enjoy all the lands which one J. had, he need not shew how much the lands were; for he cannot have notice thereof. But where I am bound upon condition to infeoff A. of all my lands which were J. N.'s. there I must shew how much the lands were. Per Yelverton, if you be bound to deliver to W. N. all the money in your purse, you shall shew how much; for you had the best notice. Br. Conditions, pl. 73. cites 9 E. 4. 15.

Br. Pleadings, pl. 116. cites S. C.

10. In trespass he who pleads *deposition of an abbot* plaintiff, after the last continuance, shall *shew before whom*, &c. Quod nota bene; for it shall be written to him to try it; and in debt brought against executors, who plead refusal, he was compelled to *shew before whom*, who said before his own commissary, for it was the archbishop of Canterbury, and then well. Br. Pleadings, pl. 37. cites 9 E. 4. 24 & 33.

Br. Lieu, pl. 32. cites S. C.
• In Br. it is as here (speere); but in the edit. 1586. it is (squire) though in the year-books of the several editions it is (speere); but it being added in the year-books (and for 2 valets) it seems it should be (squire.)

11. *Debt upon an obligation*, upon condition that if the defendant does release, set over and avoid the wages of a * speere of Callice of 18d. per diem, at the pleasure of the lieutenant of Callice, by such a day, that then, &c. and said that at D. in the county of Kent, at the pleasure of the lord Hastings, lieutenant, &c. be set over, &c. before the day, &c. Jenny said he shall shew where Callice was. And per Littleton J. if a man be bound to make scoffment of the manor of D. and pleads that he made the scoffment, he shall shew where the manor is; for it cannot be made but upon the land. Br. Pleadings, pl. 31. cites 15 E. 4. 14.

Br. Lieu, pl. 32. cites S. C.

12. *Contra* if he be bound to release, there he need not shew where the manor or land is, but he shall shew at what place he released by reason of the visne. Br. Pleadings, pl. 31. cites 15 E. 4. 14.

Br. Lieu, pl. 32. cites S. C.

13. And if I am bound to make a lease of the manor, or grant the office of parkership, it is sufficient for me to say, that I leased or granted at such a place, but it is not material where the manor or office is; per Brian. Ibid.

14. *Trespass of 10 acres of wheat*; per Pigot, it should be 10 acres sown with wheat; per Catesby, it is called 10 acres of wheat vulgarly, and so well; to which it was not answered; quare. Br. Pleadings, pl. 107. cites 17 E. 4. 1.

15. *In debt upon buying of a horse*, that he did not buy is no plea; for it is only nihil debet argumentatively. Br. Traverse per, &c. pl. 275. cites 22 E. 4. 29.

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S. P. Br. Count, pl. 63. (bis) cites 3 E. 4. 21.

16. Note, it is said, that a return and a declaration shall be certain to every intent, and therefore because he returned *rescous made at B. by M. by command of N. and did not shew the place of command*, the return is ill, and the sheriff was amerced; but it is said elsewhere, that a bar is good if it be good to a common intent; note the diversity. Br. Count, pl. 58. cites 3 H. 7. 11.

17. *In trespass of goods* the defendant pleaded, that the place was his freehold, and that he took the goods there damage feasant; the defendant was forced to set down the land in certain, because he made title to the goods; so if he makes title to the land by scoffment; but otherwise if he pleads merely his freehold. Heath's Max. 64. cites 5 H. 7. 28.

18. Note, where a man pleads, that the intestate had goods moveable in several dioceses, he ought to shew in what place, and what goods they are, so that the court may adjudge whether they are goods moveable or not, and shall not stay till the matter be traversed, and then to shew it in the rejoinder; per Rede,

Fineux,

Pineux, and Brian, but Keble, serjeant, contra. Br. Pleadings, pl. 165. cites 10 H. 7. 19.

19. In trespass, the defendant justified the detaining of the goods in pledge by accord of the plaintiff, who was indebted to him in 10 l. and good, without showing the cause of the debt. Br. Pleadings, pl. 44. cites 21 H. 7. 13.

20. Error was assigned, because it was pleaded that the defendant, at the vill of Westminster, in the county of Middlesex, released, &c. and after shewed at another time another thing to be in the vill of Westminster, and did not say aforesaid, nor in what county, and the justices held, that it shall be intended in the same vill and county, because it was mentioned in the record before. Br. Pleadings, pl. 49. cites 21 H. 7. 30.

21. A. lets a house to B. with several utensils to B. for years, rendering rent; the rent is arrear; A brings debt for this rent, and counts upon this lease, and does not shew in this count, the certainty of what the utensils were; yet it is good. So adjudged and affirmed in error. The rent in this case issues only out of the house. Jenk. 196. pl. 3.

Kelw. 153.
b. pl. 2.
Mich. 1 H.
8. Falter v.
Nokes, S.C.

22. General pleading, though in matters of fact, is disallowed; as a covenant to make an estate by the advice of J. S. he must shew what advice he gave. Hob. 295. by Hobart Ch. J. cites 26 H. 8. 1. and 16 E. 4. 9.

23. A plea in bar is either to force the plaintiff to make a replication, or to compel him to come to an issue, and therefore need not shew every thing certainly, for, peradventure, an issue may not be joined thereupon, but upon the replication. Arg. Pl. C. 28. a. b. Pasch. 4 E. 6.

24. There be 3 kind of certainties; 1st, To a common intent, and that is sufficient in bar, which is to defend the party and excuse him. 2dly, A certain intent in general, as in counts, replications, and other pleadings of the plaintiff, that is, to convince the defendant, and so indictments, &c. 3dly, A certain intent in every particular, as in estoppels. Co. Litt. 303. a.

25. Debt upon bond conditioned, that the obligee, on the 18th day of August, 4 Jac. should go from Aldgate in London, to the parish church of Stow-market in Suffolk, within 24 hours. The plaintiff shewed, that he went from Aldgate to the said place, [within the time,] but because he did not shew in his declaration, in what ward Aldgate was, it was held not good. Godb. 160. pl. 223. Mich. 7 Jac. B. R. Croffe v. Cason.

26. A condition that the obligee should enjoy an office according to a grant of letters patents, he must not plead the letters patents in hæc verba, but must shew the effect of them, and the enjoying accordingly. Hob. 295. per Hobart Ch. J. Arg. Mich. 15 Jac.

27. An *assumpsit* to pay a sum *pro diversis mercimoniis venditis* is good without mentioning the particular wares in the declaration; but an *indebitatus assumpsit* is not good, without some general or special consideration mentioned in the declaration. Jenk. 196. pl. 3.

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28. The law requires truth and convenient certainty in counts and pleadings; this certainty ought to be shewn by him, who in indictment

tendment of law has the most certain knowledge of it. Jenk. 305. pl. 79.

Sty. 43, 44.
S. C. but
ruled to stay
judgment
till they had
seen the re-
cord.

29. Trespass, &c. for taking *diversa genera apparatusum in cista pred' existen'*. After a verdict on a motion in arrest of judgment, it was agreed, that *diversa genera apparatusum* were too uncertain of themselves; but being referred to a chest wherein they lay, they were reduced to sufficient certainty; but because 2 chests were mentioned before, and the apparel was alleged to be in *cista prædicta* (in the singular number), so that it appears not in which they were, judgment was given against the plaintiff. All. 9. Pasch. 23 Car. B. R. Vincent v. Ferly.

30. Trespass for breaking his close and eating his *grass cum averiis*, &c. After verdict, error was brought and assigned; that the declaration was uncertain; and Jerman J. said that *averia* signifies cattle of several kinds, and is too general to declare upon. But by Roll Ch. J. to which Nicholas and Ask agreed, where the thing itself is in demand, for which the action is brought, as in trover, there it ought to be particularly named, but here the action is brought for damages; and so the judgment was affirmed. Sty. 170. Mich. 1649. Brook v. Brook.

31. Trespass *quare clausum fregit, & arbores succidit ad valentiam*, &c. Upon demurrer, the plaintiff prayed judgment as to the breaking his close, but as to the cutting the trees, the declaration was insufficient; because not expressed what kind of trees. 1 Vent. 53. Hill. 21 & 22 Car. 2. B. R. Thomlinson v. Hunter.

32. Trespass for entering his house and taking several things, & inter alia *unam parcellam penfarum laniarum*, anglice a quantity of woollen yarn; after verdict for the plaintiff, and intire damages, judgment was staid for the uncertainty of what quantity una parcella is. 2 Lev. 195. Trin. 29 Car. 2. B. R. Wade v. Hatcher.

33. Debt against an administratrix upon a bond given by the intestate for performance of covenants, reciting, that the plaintiff was possessed of a lease, &c. and that he assigned his interest to the intestate, reserving a yearly rent, and also 200 furs or wood faggots every year, the defendant pleaded performance; the plaintiff replied, that he had not 200 faggots every year of the intestate, but that 800 faggots were due to him from the intestate, and from the defendant after the death of the intestate for four years; upon a demurrer, the administratrix had judgment, because the plaintiff did not set forth how many faggots were due in the lifetime of the intestate, and how many after his death; for perhaps the defendant had several matters to plead, viz. one distinct matter as to those not received by the plaintiff in the intestate's life, and another as to those not received after his death. Lutw. 334. 338. Pasch. 4 Jac. 2. Tuckerman v. Tuckerman.

34. In assise and trespass which are general, the law allows the general plea of *liberum tenementum*, and that is the common bar; but it will not do where there is a special assignment; but the use of it is to inforce the plaintiff to make his charge certain, and it is only a favourable plea; for the plaintiff may have a title,

title, of lease suppose, consistent with the plea; so if he has such a special title, that plea affords him an opportunity of shewing it, and liberum tenementum is traversable; and besides, if the plaintiff has any other plea, he may come with a bene' et verum est, that it is the defendant's liberum tenementum, and shew his special cause of action; so where the defendant pleads liberum tenementum, he gives a plea traversable; per Powell J. 12 Mod. 508. Pasch. 13 W. 3. in case of Pell v. Garlick.

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35. Case for these words, *you are a whore, and a perjured whore*; per quod she *lost her marriage*. The words being not actionable, but in respect of special loss, therefore that ought to be *shewed certainly*, for it is issuable. For where the *laying of particular damage is the gift* of the action, it ought to be laid specially and certainly, that the defendant may have an opportunity of traversing it; and there is no case where the laying of particular damage is necessary to the maintenance of the action, but it must be laid certainly, and the opinion in Hetley 8. is long since exploded; *secus*, where the particular damages are *not the gift* of the action, *but only an aggravation*. Et quer' nihil capiat per billamp. 12 Mod. 597. Mich. 13 W. 3. Wetherhell v. Clerkson.

2 Latw.
129. S. C.
but that is
barely as to
the words.

36. In covenant, a breach assigned ought to be positive and certain; as where the defendant covenanted that he would *discharge all duties and charges due before Mich.* And the plaintiff assigned for breach, *that he did not discharge all duties and charges* for which the premises were chargeable; exception was taken that no answer can be given to such a particular charge. And cited Bendl. 62. pl. 110. where the breach was *quod tenementum fuit ruinosum & in decasu in diversis partibus pro defectu reparationis*, and bad for the uncertainty; and that he should shew a breach directly within the words of the covenant, was cited Lev. 246. Sed adjornatur. Comyns's Rep. 146. Pasch. 5 Ann. C. B. Dummer v. Birch.

37. *Oportet ut res certa deducatur in judicium.* See Maxims.

(B) Intendment and Implication in Pleadings.

What shall be intended, &c.

1. **I**N annuity, the plaintiff as dean of S. counted upon *prescription against the parson of Q.* and *alleged seisin at S.* and *did not say if it be in the county of N.* where the action was brought, nor in what county, neither is it alleged whether S. be a vill or not, and yet well; per cur. for it shall be intended in the same county where the action is brought. Br. Pleadings, pl. 61. cites 39 H. 6. 13.

2. *As in præcipe quod reddat in B.* it is not usual to say in B. in the county aforesaid, or in trespass in B. for it shall be intended in the same county. Ibid.

S. P. Br.
Pleadings,
pl. 29. cites
5 H. 4. 138.
because the

county is expressed before in the writ directed to the sheriff, but *contra* in a plea; for there no county is

is expressed before, and therefore it ought to be expressed after B. — Br. Lieu, pl. 52. cites S. C. — Br. Lieu, &c. pl. 44. cites 39 H. 6. 14.

3. And also it shall be intended to be a vill, if the defendant nor tenant does not plead that it is a hamlet, or that there is not any such place, &c. Br. Pleadings, pl. 61. cites 39 H. 6. 13.

Br. Lieu,
&c. pl. 44.
cites S. C.

4. And where a man pleads that the obligation by which the plaintiff [defendant] was charged, was made by dures at B. he need not say that B. is a vill, nor in what county B. is; for it shall be intended a vill in the same county. And Littleton agreed these cases, and the court awarded that the defendant answer over; quod nota. Ibid.

5. Trespass upon the case for stopping of a gutter. The defendant intituled himself by lease for years of a mill, and prescribed in his lessor, and his ancestors to stop for a time to repair the mill, and did not shew where the lease was made, and by the reporter it shall be intended where the mill is, as of attornment, surrender, or tender of money. Br. Lieu, pl. 45. cites 39 H. 6. 52.

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Br. Plead-
ings, pl. 109.
cites S. C.

6. In writ against a sheriff for embezzling of a writ, he need not allege that he was sheriff at the time of the embezzling. Br. Action Sur le Case, pl. 100. cites 21 E. 4. 22.

7. So in writ against a gaoler upon escape. Ibid.

8. The wearing of the livery against the statute shall be intended to be where it was given. Br. Lieu, pl. 89. cites 5 Hen. 7. 17.

Br. Waste,
pl. 144.
cites S. C.

9. Waste by the prior of B. &c. to the disinherittance of the prior and house of B. and did not say of the aforesaid prior, nor of B. aforesaid, and yet well, per cur for it shall be intended the plaintiff. Br. Pleadings, pl. 163. cites 10 H. 7. 5.

For more of Certainty in Pleadings in general, see tit. Amendment and Rejoinders; and see the pleadings to the several titles throughout this work.

Fol. 394.

* The writ of certiorari is an original writ, and issues sometimes out of B. R. and lies where the king would be certified of any record which is in the treasury

* Certiorari.

(A) Certiorari. Out of what Court it ought to issue; and to whom; Et e contra.

[1.] IF the record be pleaded in a more base court than that in which it is, the court may grant a certiorari. 4 H. 6. 23.]

or in C. B. or in any other court of record, or before the sheriff and coroners, or of a record before commissioners, or before the escheator; then the king may send that writ to any of the said courts or offices, to certify such record before him in banco, or in the chancery, or before other justices, where the king pleases to have the same certified. F. N. B. 245. (A)

Br. Failure de Record, pl. 3. cites S. C. — Fitzh. Record, pl. 17. cites S. C.

[2. In

[2. In an *information in banco upon the statute of recusants*, if the defendant pleads a conviction at the session of peace in Middlesex, and the plaintiff pleads *nul tiel record*, the common pleas will grant a certiorari to the justices of peace to certify them of the record, because they shall be certified by the tenor of the record. Hill. 14 Jac. banco, *PIE AND TRILL*, adjudged, though it was objected that it ought to issue out of chancery, and come by mittimus in banco. Hobart's Reports, 182. the same case; and there afterwards awarded to the justices of gaol delivery.]

Hob. 135. pl. 181. S.C. & S.P. held accordingly; but if it were to certify the record itself, as upon a writ of error, or a certiorari out of B.R.

to a justice of peace, which removes the very record itself to hold plea upon, there it were otherwise. But it appeared after, that the plea was of a conviction before the justices of gaol-delivery, and so the certiorari and all was void; but a certiorari was awarded de novo to the justices of gaol-delivery.—— See Trial (E) 1. S. C.

[3. *So in conspiracy in banco, upon an indictment before justices of peace*, if nul tiel record is pleaded, a certiorari shall issue out of bank, and then process shall issue thereupon, till he hath done the one or the other, because this is the more base court. * 4 H. 6. 23. b. † 19 H. 6. 19.]

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* Br. Failor de Record, pl. 3. cites S. S. —
In this case defendants

have a day given them to bring in the record, and fail; the plaintiff has judgment; this judgment was reversed; for the court of C. B. ought to have awarded a certiorari to the justices of peace, to certify whether they have such a record; for they are an inferior court to the court of C. B. But in this case, where the court is superior, or the jurisdictions equal, day is given to the defendant to have the record in court by a certain day. By the justices of both benches. Jenk. 114. pl. 23.

† Fitzh. Record, pl. 4. cites S. C. and Mich. 18 H. 6. ——— Br. Record, pl. 24. cites S. C.

4. Writ issued to the executors of the coroners of N. out of the chancery, to send all their rolls which were such a coroner's, and this seems to be by certiorari, and the rolls were certified in B. R. but Brook says, it seems that *they shall come first into the chancery*. Br. Certiorari, pl. 9. cites 43 Aff. 40.

2 Hawk. Pl. C. 290. cap. 27. f. 42. S. P. and cites S. C.

5. Knivet Ch. J. denied J. S. to have writ to remove indictment out of the court of C. into B. R. for this court *never writes if they have nothing before them* which may induce them to write, and therefore sent them into chancery to have a writ to bring in the record and the body before them. Br. Certiorari, pl. 8. cites 41 Aff. 22.

6. *Trespass in C. B.* they are at issue, which passed for the plaintiff at the nisi prius, and the plea is *without day by deposition of king E. 4. before the day in bank*, there the plaintiff may have a certiorari out of the same bank, to bring the record of nisi prius into bank, and then shall have re-summons or re-attachment, as his case lies, to have judgment against the defendant; quod nota. Br. Certiorari, pl. 11. cites 10 E. 4. 13.

A record may be removed into B. R. as well by certiorari out of B. R. as by certiorari out of chancery, and removal

into B. R. by mittimus; resolved. Ld. Raym. Rep. 216. Pasch. 9 W. 3. *Gulliam v. Hardy*. ——— Ibid. Marg. says, the law is the same in C. B. and was so held by all the judges Hill. 8 & 9 W. 3. In C. B.

7. Where the sheriff returns *mandavi ballivo talis libertatis*, and it is alleged that there is no such liberty there, certiorari may issue from the chancery to the treasurer of the exchequer, to certify the roll of the liberties to the justices, &c. for there are all the liberties inrolled by the stat. W. 2. cap. 39. Br. Certiorari, pl. 13. cites 11 E. 4. 4.

Br. Return de Brief, pl. 98. cites S. C.

8. Certiorari

Br. Peace,
pl. 11. cites
S. C. —

And if he
dies having

a recognisance in his custody, a certiorari may be directed to his executor or administrator to certify it.
2 Hawk. Pl. C. 290. cap. 27. l. 42.

8. Certiorari issued to a justice of peace who had taken recognisance, to make him certify it to the king. Br. Certiorari, pl. 10. cites 2 H. 7. 1.

S. C. cited
Arg. Saund.
98. that the
point was
doubted.—
Dawson tit.
Certiorari,
pl. 4. cites
S. C. cites
it as adjudg-
ed, but vide
librum.

9. Debt in C. B. upon a judgment in B. R. The defendant pleaded nul tiel record. The plaintiff in C. B. obtained a certiorari out of the chancery, to send the record thither, which by mittimus might be sent in C. B. It was doubted whether such certiorari was allowable, because the records of B. R. shall not be removed out of that court in any other court, the pleas there being coram rege. Divers precedents were shewed; where such records by mittimus were sent out of that court into C. B. and upon view of the precedents the court was of opinion, that the course of sending them by mittimus was well allowable; sed adjournatur. Cro. C. 297. pl. 7. Hill. 8 Car. B. R. Lutterel v. Lea.

Lev. 222.
S. C. & S.
P. inferred
by the re-
porter.—

Ibid. 329,
330. pl. 11.
S. C. and in
a nota there
says, the

usual way of sending the record is by certiorari and mittimus out of chancery to the inferior court, and then it being under the great seal is pleadable there.

* [332]

Ibid. says
that the
same was
done in Sir
THOMAS
KRAV'S
case, late
sheriff of
Hertford-
shire, where
the fine and
the cause of
imposing it
were con-
sidered and determined by the barons.

8. A fine was imposed on the sheriffs of London and Middlesex, by the justices of peace of the county, and estreated into the exchequer on a mandate from the chief baron, and this being certified into B. R. the court would not suffer the return to be filed; because the fine being estreated, the order was executed, at least in part, and so as it was not proper for B. R. to intermeddle; for that would be to anticipate the judgment of the exchequer, where the whole matter may be properly determined. 2 Jo. 169. Mich. 33 Car. 2. B. R. The case of the sheriffs of London and Middlesex.

2 Hawk. Pl.
C. 287. cap.
27. l. 29.
says that it
is said, that
the court of
B. R. will
never grant
a certiorari
for a convic-
tion of recu-
sancy upon a
default at

9. Two justices tendered the oaths appointed by the statute 1 Will. 3. cap. 8. to Dr. Sands, which he refusing, it was certified to the judge of assize, and by him into the exchequer, according to the statute 7 & 8 W. 3. cap. 27. A certiorari was prayed to remove this conviction of recusancy into B. R. but Holt Ch. J. said it could not be granted, because it would evade the statute; for when it is in B. R. it cannot be sent back again, and the party cannot be proceeded against here; and said that the case of the duke of York, who was presented upon the statute 3 Jac. 1. cap. 4. at the quarter-sessions for not coming to church,

church, was the only cause wherein it ever was done. 1 Saik. *sessons*, because by the statute, such
145. pl. 5. Pasch. 10 W. 3. B. R. Dr. Sand's case.
convictions are to be removed into the exchequer, and from thence process is to be awarded upon them. But the court of B. R. cannot proceed upon them, and therefore will not suffer them to come thither, lest the statute should be evaded.

(B) *To what Court it may be granted.*

[1.] *If indictments are taken in Pembroke-shire, or Brecknock-shire in Wales, before the justices of the great sessions there, a certiorari may be granted out of the king's bench, to the said justices to remove those indictments, because these are but the declarations of the king, which he may remove where he pleases.* Mich. 15 Jac. B. R. a certiorari was granted for the indictments of one COLLINS, and one BARTLET, and one * SIR J. CARY, but the justices there would not return them, upon which the court was of opinion to grant an attachment; but upon the prayer of the attorney-general, a new certiorari was granted. (*Quære how the court of king's bench may proceed upon these indictments.*)

* Cro. J. 484. pl. 1. Trin. 16 Jac. B. R. Sir John Carew's case, a certiorari was granted to remove indictments of riots taken in Wales, there being divers precedents to that purpose, as

the clerk of the crown informed the court. — 2 Hawk. Pl. C. 287. cap. 27. s. 25. says, it seems to be settled, that such a certiorari lies to remove any indictment taken in Wales for a crime not capital, either at the grand-sessions, or at the sessions of the peace; but it is said that it has never been granted to remove an appeal from Wales; neither doth it seem to be clearly settled, that it lies to remove an indictment of felony from thence, for such indictments are never quashed, as indictments for inferior crimes are. Neither do I find it agreed in what manner B. R. shall proceed † on any indictment removed from Wales; but it is said, that an indictment of felony so removed may be tried in the next English county, by force of 26 H. 8. But it seems agreed, that this statute extends not to appeals.

† [333]

[2. Trin. 16 B. R. it was argued by Jenkins, that a certiorari does not lie, by reason of the *statute of 27 H. 8. & 34 H. 8. cap.* by which absolute power in the affirmative is given to the justices there; but notwithstanding this, per totam curiam, those statutes bind not the king, but he may sue where he pleases; and therefore it was ordered, that a return of the said writ should be made by a day, and the clerks said there were many precedents of the same nature, and upon some of them the trial had been in the county next adjoining. Mich. 13 Car. B. R. a certiorari was granted in the case of one EVANS, and others, to remove indictments of murder taken within one of the 4 new counties, which were counties marchers.]

In the court of Montgomery, 17 were indicted of murder done in a quarrel between Herbert and Vaughan, and were imprisoned; but were of so great power in the county, that a jury

could not be got to appear. The court granted a certiorari, and the indictments were returned into B. R. and ordered the trial to be in Shropshire. Lat. 12. Hill. 1 Car. Herbert and Vaughan's case.

[3. Mich. 9 Car. B. R. A certiorari was granted to remove the indictments of one CHEDLE, and others, of *petit treason*, for the murder of SIR RICHARD BULKLY, which were taken in Anglesey, though this be in North-Wales, and a county of itself, at the time of the making of the statute of Rutland. And the court said, that although they were not yet resolved that it could be tried in

Cro. C. 248. pl. 8. Hill. 7 Car. B. R. at the end of Sonthey v. Price, says, note the statute of

26 H. 8.
• Fol. 395.

cap. 6. allows that indictments may be in counties next adjoining; but there is not any mention therein of appeals; and

for this reason certioraries have been granted to remove indictments out of the grand sessions, but never writs of appeal. — Cro. C. 333. pl. 16. S. C. Dubitatur, and appointed to be argued, whether a certiorari was grantable. — S. C. of Chedley, and also of Soutley v. Price, cited Vent. 93. Trin. 22 Car. 2. B. R. Anon. Where a certiorari was granted to remove an indictment of manslaughter out of Wales; and ordered that the prosecutor should be bound by recognizance, to prefer an indictment in the next English county; but the court at first doubted whether they might grant it, in regard it could not be tried in an English county; but an indictment might have been found thereof in an English county, and that might be tried by 26 H. 8. cap. 6. — Same cases cited Vent. 146. Trin. 23 Car. 2. B. R. in Morris's case, and says that in Chedley's case, a certiorari was granted, as was likewise in the principal case to remove the indictment found in Anglesey, which was afterwards tried in the next English county; and the court held, that so it might be in the principal case of Morris, who was indicted for murder in Denbigh, and a certiorari to remove it into B. R. in order to try it in the next English county.

It is the constant practice to grant certioraries into the counties palatine of Durham

and Lancaster, which yet had original jurisdiction, and the same courts among themselves; per Holt Ch. J. 14. Raym. Rep. 581. Trin. 12 W. 3. obiter.

[4. If a certiorari be directed to the justices of peace in the county of Durham, to certify an indictment taken there before them, they ought to return it. Mich. 10 Car. B. R. CLARK's case; where they returned that it was a county palatine by prescription, and the court advised thereupon.]

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[5. [So] 11 Car. B. R. in one SIMPSON's case, a certiorari with a pain was granted to Durham, to remove an indictment of barratry there taken, before the justices of the peace; for they were made justices by statute.]

† Cro. C. 252. pl. 3. Tyndale's case. S. C. & ibid. 264. pl. 13. S. C. the court awarded a writ of certiorari directed to the mayor and jurats; and ibid. 291. pl. 1. S. C. the record was removed into B. R. and the defendant tried there and acquitted.

[6. A certiorari lies to the justices of peace within the cinque ports, to certify an indictment of sodomy taken before them; because this is made felony of late time, of which they cannot hold plea there, without a charter of late time. Trin. 8 Car. B. R. HOPSTILL † TILDEN's case resolved; and the indictment taken in Sandwich removed accordingly, and tried thereupon, and found not guilty. Mich. 8 Car. B. R. † DUGDALE's case, such a certiorari was granted, and the indictment taken at Dover removed accordingly.]

† Cro. C. 253. at the end, pl. 3. cites Ringden's case. Mich. 8 Car. and seems to intend S. C. where a certiorari was prayed to the mayor and justices of Dover, being within the cinque-ports in a like case; but it was objected that it should be directed to the lord warden of cinque ports, as other process usually is; but upon debate, all the court agreed that it should be immediately directed to the justices, before whom the indictment was; for they hold plea of it as justices of peace, by virtue of their commissions, and not by their ancient charters of prescription, which was awarded accordingly. — 2 Hawk. Pl. C. 236, 237. cap. 27. s. 24. cites the principal case of Roll, and says that by the reason

reason there given, it seems to be implied that Roll's opinion was, that indictments in such courts, of crimes whereof they have jurisdiction, are not removeable; but says that other books there cited by him seem to speak generally of all indictments; and to lay it down as a rule, that the privilege of the courts of the cinque-ports used time out of mind, that the king's writ does not run there, is to be intended only of civil causes between party and party.

7. The plaintiff set forth, that his father and he are jointly seised for life of the lordship of Barrington in the county palatine of Durham, and that the defendant sues his father for those lands before the chancellor of Durham; and for that it was informed that the plaintiff *dwells in Ratcliff in the county of Middelsex*, and that the plaintiff's father is an old diseased man, and *not able to follow his suit*; therefore a certiorari is granted, directed to the chancellor of Durham, to certify into this court the whole matter depending before him. Cary's Rep. 68, 69. cites 2 Eliz. fol. 200. Hilton v. Lawfon.

It was said by one of the clerks of the crown, that a certiorari had many times been returned from Durham. Lat. 160. Trin. 2 Car. in Jobson's case.

8. The Register makes mention of a certiorari to remove a record taken at Calice. Cro. C. 484. pl. 1. Trin. 16 Jac. B. R.

9. Where judgment is given before the sheriff, and the tenant has no goods, &c. in that county, he may have a certiorari to remove the record into B. R. and there have execution; for that is not placitum. 2 Inst. 23. ad finem.

10. If there be an indictment for a forcible detainer upon the 8 H. 6. before justices of the peace in the county palatine of Chester, it may by certiorari be removed in B. R. for the justices of peace there, being made by letters patents, their proceedings, quatenus justices of peace, must be subject to B. R. per Bacon, and a certiorari awarded accordingly; and the indictment being returned, was quashed. All. 49. Hill. 23 Car. The King v. Simmons.

11. A certiorari was denied to remove an *order of sessions for chusing one constable*, because if it had been granted, it might have prevented justice being done by the justices of peace, but bid them appeal to the justices of assize; but a writ was granted to compel the constable to be sworn. Sty. 126, 127. Trin. 24 Car. B. R. Anon.

12. By the statute 15 Car. 2. cap. 17. it is enacted, *That there shall be certain commissioners, who shall have power to receive claims concerning the fens in the counties of Cambridge, Huntingdon, &c. and to settle their bounds, and make and return their decrees into the petty-bag in chancery.* After consideration of the statute, it was resolved, that no certiorari shall be granted, and if any be, there shall be a procedendo; for it is a new judicature, and absolute in the commissioners by this new law, with which this court has nothing to do if they proceed according to the statute; but if not then all is void, et coram non judice, and the parties are at liberty to examine it in an action at common law. Sid. 296. pl. 20. Trin. 18 Car. 2. B. R. Ball v. Parteridge.

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13. The question was, whether a certiorari lay to *Winchelsea*, being one of the cinque-ports, for a record made there, whereby they had taxed the foreign, and which they insisted was made for the preservation of the corporation, and to raise ammunition to provide against invasion of foreigners; and that *breve domini*

2 Lev. 86. The King v. the Corporation of Winchelsea, S. C. and the return

adjudged insufficient; and this case is not merely civil between party and party, but between the corporation and the party.

regis non currit to the cinque-ports. The counsel that argued against the certiorari, confessed that in matters which concerned the king's revenue, or in matters criminal, or where the liberty of a subject is concerned, a certiorari would lie; but that this case was none of those, and that they had always liberty of taxing the foreign for defence of the corporation in time of war, especially when in danger of foreign invasion. Hale Ch. J. said they ought to shew some jurisdiction, to which the party, if injured, might appeal, otherwise the corporation will be party and judges, and tax the land of the foreign to what value they please; and said there were 3 sorts of suits, 1st, Between party and party, and there you must return that you have jurisdiction. 2dly, Matters of the crown; and 3dly, Matters of a middle nature, as where the king and his subjects are both concerned, as in this case; sed curia advisare vult. Freem. Rep. 99. pl. 111. Pasch. 1673. B. R. Winchelsea Port's case.

A certiorari lies out of C. B. to the court of Ely, and to any franchise

which hath consueance of pleas, and which is more than a bare franchise tenere placita; per cur. 1 Salk. 148. pl. 13. Hill. 1 Ann. B. R. Crofs v. Smith. — 12 Mod. 643. Hill. 13 W. 3. S. C. & S. P. accordingly. — 3 Salk. 79. pl. 4. S. C. & S. P. — 7 Mod. 138. S. C. & S. P. admitted. — 2 Ld. Raym. Rep. 836. S. C. & S. P. accordingly, and so a judgment given in the court of the bishop of Ely was reversed.

14. A rule of court was made that no certiorari should go to the sessions of Ely without motion in court, or signing of it by a judge in his chamber. 3 Mod. 229. Trin. 4 Jac. 2. B. R. in 2 nota.

15. The court denied to grant a certiorari to the *Old Baily*, saying they never do it, because the judges sit there; yet quære how B. R. can legally take consueance of proceedings there without a certiorari, the *Old Baily* being another court, and possessed of their own records till removed by certiorari, &c. Cumb. 319. Hill. 6 W. 3. B. R. Monger's case.

16. A motion was made for a certiorari to remove an indictment of barratry found at the sessions of gaol-delivery; and one *NURSE'S CASE* was cited, wherein such a motion was granted. But per cur. it is never granted to remove an indictment found before justices of gaol-delivery without some special cause. So it is of the *Old Baily*; and if such certiorari should be granted, and the cause suggested should afterwards appear false, a procedendo should be awarded. 1 Salk. 144. pl. 2. Pasch. 9 W. 3. B. R. Anon.

17. Indictment in the grand sessions of Wales, and certiorari granted to remove it, at the prayer of the defendant; and now a superedeas was prayed to the writ, because a certiorari does not lie into *Wales*; or if it does, it is only when the king directs or desires it, and not at the desire of the defendant; but the court held that certiorari lies either at the desire of the king or of the party, according as the court shall think fit; and accordingly a rule was given for the return of the certiorari, and that the indictment should be tried in the next English county. 12 Mod. 197. Trin. 10 W. 3. The King v. James.

18. Indictment

18. *Indictment* being found against the defendants in London for printing and publishing a *paper* intituled *the Black Ram*, wherein certain persons were scandalously described, so as any body that knew them might know them to be the same persons; and among others the recorder of London was mauled; and certiorari was moved for by Montague, insinuating that it would be hard to be tried at the *Old Baily*, where some of the judges might take themselves to be scandalized by that paper; and the court said they seldom would grant certiorari to the *Old Baily*, yet they granted one here, though it could not be tried here this term; for certiorari into a foreign county ought to have 15 days between its *teste* and return; and though by consent it may be returned immediately, yet still there must be 15 days between the *teste* of the writ and return of the jury, which could not be within this term. 12 Mod. 250. Mich. 10 W. 3. *The King v. Dutton & al*, printers.

19. Certiorari to remove a conviction may go to any new constituted court, or jurisdiction of record, as to the censors of the college of physicians, because B. R. has a power to keep all limited jurisdictions within their proper bounds; per Holt Ch. J. Carth, 494. Pasch. 11 W. 3. B. R. in case of *Dr. Groenvelt v. Dr. Burnell*.

20. Where any court is erected by statute, a certiorari lies to it; so that if they perform not their duty, B. R. will grant a mandamus. There was a mistake made by the commissioners of sewers, grounded upon this, that where the 23 H. 8. cap. 5. says that the commissioners, in several cases there mentioned, shall certify their proceedings into chancery; afterwards by 13 Eliz. cap. 9. it is enacted that hereafter the commissioners should not be compelled to certify or return their proceedings, which they interpreted to extend to a certiorari, and thereupon they refused to obey the certiorari; but they were all committed; and yet the statute does not give authority to this court to grant a certiorari; but it is by the common law that this court will examine if other courts exceed their jurisdiction; per Holt Ch. J. in delivering the opinion of the court. Ld. Raym. Rep. 469. Pasch. 11 W. 3. in case of *Groenvelt v. Burwell*.

12 Mod. 390. S. P. in S. C. and Holt Ch. J. says that the commissioners were obliged to obtain the king's pardon for their offence; and that Mr. Callice, in his reading upon the statute of sewers, holds that their orders are removable

here by certiorari. * Raym. 186. S. C. accordingly. — Vent. 66. Pasch. 22 Car. 2. B. R. Smith's case. — See tit. Sewers (E) pl. 2.

21. Certain orders of justices, made pursuant to a private act of parliament for repairing Cardiffe-bridge, were removed hither by certiorari; and one objection was made, that this court could not send a certiorari to the justices of the peace in Wales, because it might be sent by the court of grand sessions, which was as B. R. and which by this means was skipped over and rendered useless. Sed non allocatur. It is the constant practice to send them into the counties palatine, and yet they have original jurisdiction, and the same courts within themselves. The counsel for the Welch jurisdiction said this differed, because the jurisdiction of counties palatine was derived from the crown; but this was not regarded. 1 Salk. 148. pl. 7. Trin. 12 W. 3. B. R. Cardiffe-bridge's case.

Ld. Raym. Rep. 580. The King v. the Inhabitants of in Glamorgan-shire, S. C. says that the orders were for levying money by virtue of the statute of 23 Eliz. cap. 11. for repair-

ing Cardiff-bridge. It was objected that a certiorari would not lie; and cited the case of *Ball v. Partridge*, D 43

Partridge, 1 Sid. 296. *Sed non allocatur*; for this court will examine the proceedings of all jurisdictions erected by act of parliament; and if they, under pretence of such an act, proceed to encroach jurisdiction to themselves, greater than the act warrants, this court will send a certiorari to them to have their proceedings returned here, to the end that this court may see that they keep themselves within their jurisdiction, and, if they exceed it, to restrain them. And the examination of such matters is more proper for this court; as in the case in question, whether the act of Q. Eliz. impowers the justices to raise money to mend wears, and to determine the doubt upon the act. As to the cases of orders made by the commissioners of sewers, and of the fens, the court is * cautious in granting certioraries, and first they make enquiry into the nature of the fact, and what will be the consequence of granting the writ, because the country may be drowned in the mean time, whilst the † commissioners are suspended by the certiorari; but that is only a discretionary execution of the power of the court. — Comyns's Rep. 86. pl. 54. Trin. 12 W. 3. B. R. the King v. seems to be S. C. but is very short; says the justices ought to return the private act upon which their order is founded, and that a certiorari was granted. — 12 Mod. 403. S. C. and says it was ruled that they should make a return, and recite the statute in it.

* 12 Mod. 390. S. P. accordingly by Holt Ch. J. obiter.

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12 Mod. 22, A certiorari lies to *exempt jurisdictions*; per Holt Ch. J. in delivering the opinion of the court. 1 Salk, 148. pl. 13. Hill, 1 Ann. B. R. Cross v. Smith.

3 Salk. 79. pl. 4. S. C. & S. P. — 2 Ld. Raym. Rep. 837. S. C. & S. P. — So that there is *no court or jurisdiction that can withhold a certiorari*; as in the case of a customary proceeding by foreign attachment in London, if the defendant cannot find bail below, he may sue a certiorari, and upon putting in bail in the superior court, the cause will proceed there, and all the proceedings below upon the attachment are dissolved; per Holt Ch. J. in the several books above cited.

23. It seems to be admitted in the late reports, that a certiorari may be granted to remove any *indictment from London or Middlesex*; but it is said that he who prays it ought to give 3 days notice to the other side. Also it is said, that by a certiorari to London *the tenour of the indictment only shall be removed* by the city charters; and it seems that anciently that city insisted on a privilege, that all indictments and proceedings for any cause, except felony, should be tried and determined there, and not elsewhere, 2 Hawk, Pl. C. 287, cap. 27, f. 26.

(B, 2) What Records shall be removed by it.

B. C. cited
Arg. 2 Ld.
Raym. Rep.
1209.

[1. IF a certiorari be awarded out of B. R. *the last day of Trinity term, to remove all indictments of forcible entry* against certain persons, *where they are not indicted at the time of the award of the certiorari, nor at the time of the delivery of the writ to the officer, but after they are indicted in the vacation before Michaelmas term*, they ought to be removed by force of this writ. Mich. 37 & 38 Eliz. B. R. CHENEY'S CASE, per curiam.]

[2. If a certiorari issues to remove an indictment of forcible entry against several, naming them, whereas but 4 of them are indicted, yet it ought to be removed, Mich. 37, 38 Eliz. B. R. CHENEY, per curiam.]

3. If certiorari issues to justices of the peace to send the indictment of N. and in the same indictment 20 others are indicted, yet this is a good certificate of the record, and the justices of the peace shall

shall not mention any thing of the others in their certificate; per Markham Ch. J. Br. Record, pl. 57. cites 6 E. 4, 5.

4. A certiorari *will remove any indictment if it be before the return thereof, though it be after the teste of the writ.* Agreed per cur. 2 Keb. 142. pl. 13. Hill. 18 & 19 Car. 2. B. R. *The King v. Buck.*

5. A certiorari was brought *to remove an indictment of force against L. and T. unde indictati sunt.* An attachment was prayed for not removing an indictment against L. only. The court held *this writ joint and several*, but that a writ of error will not remove a several indictment. 3 Keb. 102. pl. 2. Hill. 24 Car. 2. B. R. *The King v. Levett.*

S. C. cited Arg. 2 Ld. Raym. Rep. 1199, 1200. Mich. 4 Ann. in case of the Queen v. Bains; but it was

answered by the other side that this case in 3 Keb. was only, that a certiorari might be joint and several, which a writ of error could not be, which he agreed; but that then there must be several words, as it must be intended that there were in that case. *Ibid.* 1202. — And *ibid.* 1203, Powell J. said he thought they would have searched for the writ in that case of 3 * Keb. because, notwithstanding any thing said in the book, the writ in that case might be joint and several; and Holt Ch. J. said that where a report of a case is doubtful, it ought to be verified by the record.

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6. *B. W. and F. were jointly indicted at the sessions, and B. was also severally indicted, and W. F. and J. S. were indicted in another indictment, and a certiorari was awarded, to remove all indictments in which the said B. F. and W. were indicted, without saying, vel aliquis eorum indictatus existit.* Adjudged, that only the joint indictment was removed, and that the justices below may proceed on the others without contempt. 1 Salk. 146. pl. 9. Mich. 11 W. 3. B. R. *the King v. Brown, Wood, and Fossebrook.*

Ld. Raym. Rep. 609. Mich. 12 W. 3. S. C. says the return was of one indictment against B. and of another against W. and another against F.

in which they were indicted alone by themselves. On motion to quash the indictment against B. it was held, that it was not removed before B. R. for this is not the indictment intended, the certiorari meaning the indictment in which B. W. and F. were jointly indicted; but had it been *vel per quod aliquis eorum indictatus existit*, it had been otherwise. — 3 Salk. 73. pl. 2. S. C. & S. P. — S. C. cited as of a certiorari to remove *all orders against A. B. and C.* and the case was, that there was a joint order against A. B. and C. and another order against B. and C. and another against A. only; it was resolved, that the joint order was only removed, and not that as to B. and C. only, and the other against A. only. 2 Ld. Raym. Rep. 1200. Mich. 4 Ann. Arg. cites it as the case of the King v. Fossebrook; but says, that the reason of the resolution was, because the court took it that the first was the only order intended to be removed. — *Ibid.* Mr. Broderick said, that the case of Fossebrook was as it is cited, but that it was resolved by the three judges, *absente Holt Ch. J.* — *Ibid.* 1203. Powell J. asked the counsel, how they answer the case of the King v. Fossebrook. — 2 Hale's Hist. Pl. C. 212. cites Mich. 22 Car. 1. B. R. Adjudged, that such a certiorari to remove all indictments against A. and B. removes all wherein A. or B. are indicted, either alone, or together with other persons, and cites also 1 R. 3. 4. b. and 16 H. 7. 16. a.

If A. B. C. and D. be actually indicted in one indictment for one offence, and a certiorari be to remove all indictments against A. and B. this will be sufficient to remove the indictment against A. and B. and also it removes the indictment as to C. and D. for the justices may deliver the indictment *per manus proprias*. Mich. 37 & 38 El. B. R. Woodward's case contra 6 E. 4. 5. a. 2 Hale's Hist. Pl. C. 213, 214.

But if the indictment be but one, but the offences several, as if A. B. C. and D. be indicted by one bill for keeping several disorderly houses, a certiorari to remove this indictment against A. and B. removes not the indictment as to C. and D. for though they are all comprized in one bill, yet they are several indictments, and several offences, and so the record is in B. R. virtually and truly as to A. and B. but as to C. and D. the record remains below. 2 Hale's Hist. Pl. C. 214.

But if the justices *per manus suas proprias* deliver the bill into court against all of them, as they may, then if a record be made of that delivery, the indictment is entirely removed against A. B. C. and D. because not done upon the writ of certiorari, but *per manus suas proprias*; but otherwise it is where the offences are several, and the indictment against A. and B. is removed by writ, and by a return indorsed upon the writ, for then that single indictment that concerns A. and B. is removed, and not the others, where the offences are several, and severally charged. 2 Hale's Hist. Pl. C. 214.

D d 4

But,

But, as I said, if there be one indictment against A. B. C. and D. for one murder or burglary, another against the same persons for robbery, and a third against the same persons for a rape, a certiorari to remove all indictments against A. and B. removes all these several indictments against A. B. C. and D. for though in law each of them be severally a felon, yet inasmuch as they are jointly charged, they shall be all removed as to A. B. C. and D. by virtue of this one writ, contrary to the opinion of Markham 6 E. 4. 5. a. 2 Hale's Hist. Pl. C. 214.

S. P. held accordingly, Mar. 27. pl. 63. Trin. 15 Car. B. R. Anon. — A. and B. were indicted of murder. B. flies, and A. brought certiorari to remove the indictment into B. R. it was said, that the whole record was removed, and that there cannot be a transcript in this case, because the writ is recordum & processum cum omnibus ea tangentibus, but the chief justice doubted of it, and said, that the opinion of Markham, in one of our books, is against it, and that it would be mischievous should it be so, because in such case B. might be attainted by outlawry without his knowing of it. Mar. 112. pl. 190. Trin. 17 Car. Anon. — 2 Hawk. Pl. C. 292. cap. 27. f. 5. says, that if divers are indicted in the same indictment, and some find sureties, and others not, the indictment ought to be removed as to those who find sureties, because they shall not be prejudiced by the default of the others; and that, as some say, it shall be removed as to the others also, and cites Keb. 231. pl. 51. 6 E. 4. 5. a. and Mar. 111. [but misprinted for 112.]

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1 Salk. 148. pl. 13. Crofs v. Smith, S. C. & S. P. accordingly. — 12 Mod. 643. S. C. but I do not observe S. P. — 3 Salk. 79. pl. 4. S. C. but not S. P. — 2 Ld. Raym. Rep. 836. 838. S. C. & S. P. held accordingly, per tot. cur. — 2 Ld. Raym. Rep. 1305. Mich. 8 Ann. Anon. S. P. per Powell. J. accordingly. — S. C. cited Arg. 2 Ld. Raym. Rep. 1202.

1 Salk. 151. pl. 21. S. C. but this point of the order removed being made subsequent to the teste of the writ, does not appear there.

7. Two being indicted, one of them removed it by certiorari, entering into recognizance to carry it down to trial; and it was resolved, that the indictment was removed *quoad both*, and that the defendant who removed it *saves his recognizance by trying it as to himself*; for that the acquittal of one is not an acquittal of the other, nor vice versa; neither can it be exacted of him to enter into a recognizance to try against both; and that, notwithstanding the other defendant had appeared below, and now by the removal is put without day, wherefore if he *do not come in above gratis*, process of outlawry shall go against him; and for this cause it was, that before the statute the course was to grant no certioraries to remove indictments from London or Middlesex, without the defendant gave bail to try it; and the Ch. J. said, it is always indorsed on the back of the certiorari, at whose request it is granted; for though it be the king's command, yet it is a prayer of the party, and the end of certioraries is to do justice, and prevent vexation and * oppression; and if 2 be indicted jointly, and join in plea, there shall go but one venire facias; fecus if they sever. 12 Mod. 601. Mich. 13 W. 3. The King v. Worfenholm and Weeks.

8. A certiorari issued to the court of Ely, to certify *all pleas tunc nuper levat*. The plea [plaint] was levied after the teste, and before the return. Per cur. it was well removed; for a certiorari, as well as a recordare, shall remove *all pleas pending at the time of the return*. 7 Mod. 138. Hill. 1 Ann. B. R. Smith v. Crofs.

9. A certiorari was to remove *omnes ordines against A. and B. nuper factor*; the order removed was against B. only, and this order appeared to be made after the teste of the writ. The question was, whether this order was well removed, and the court ordered counsel of both sides to speak to this point, and after argument the certiorari was quashed, because it was not sufficient to remove this several order, and a new writ was granted; but it was agreed to be a good writ to remove a joint order against A. and B. 2 Ld. Raym. Rep. 1199. Mich. 4 Ann. B. R. the Queen v. Bains.

(B. 3.) Directed. To what Persons.

1. **S** Erjeant Hawkins says, 2 Hawk, Pl. C. 290. cap. 27. f. 43. that all the precedents he is able to find of certioraries for the removal either of indictments or recognizances from sessions, are directed either to the justices of peace for the county generally, or to some of them in particular by name, and not to the *custos rotulorum*; and, according to Lambard, they are never directed to him; yet it is taken for granted in the year-book of H. 7. [2 H. 7. 1. pl. 2.] that after a recognizance for the peace is brought into *custos rotulorum*, it shall be certified by him; but surely, if the certiorari be directed generally to the justices of the county, or any one of them, it may be as well returned by any of them, as by the *custos rotulorum*; and he questioned whether it can be well returned by him, unless he do it as justice of peace, naming himself such; but if there are sufficient precedents to warrant the directing the certiorari to him as *custos rotulorum*, there can be no doubt but that a return by him as such will be good.

2. An *assise* is taken before one of the justices of assise only, and the clerk of assise does not wait the coming of the other justice of assise, yet the other justice by certiorari may certify the same record. Br. Record, &c. pl. 81. cites 11 H. 7. 5.

2 Hawk.
Pl. C. 290.
cap. 27.
S. P. and
cites S. C.

3. A certiorari may be directed to the sheriff and coroner to remove an appeal by bill before the coroner, because the sheriff has a counter-roll; but if the certiorari be directed to the sheriff only in case of appeal, or indictment, or death, it is not sufficient to remove the record, because he is not judge of the cause, but has only a counter-roll. 2 Inst. 176.

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4. If * one of the justices of assise dies before the return, a certiorari may be awarded out of the court of common-pleas to the survivor, to certify the verdict; if both the justices die, the clerk of the assise may bring it in without a certiorari, or a certiorari may be awarded to the executors or administrators of them, to certify the record. 2 Inst. 424.

* S. P. accordingly,
2 Hawk.
Pl. C. 290.
cap. 27. f. 42.

5. A certiorari to remove a record ought not to be made but to an officer known to have the custody of the record, and upon a surmise that he hath such a record in his hands; per Roll Ch. J. and therefore we will not upon an affidavit grant a certiorari, but upon a surmise made upon the roll. Sty. 371. Pasch. 1653. B. R. Anon.

S. P. notwithstanding regularly it ought to be directed to the judge of the inferior court, and in some

cases to others, as shall be most agreeable to the usual course of approved precedents, which seems to be the best guide whereby to judge of this matter, and accordingly it seems, that for an indictment or confession of an approver before a coroner, it shall be directed to the coroner alone; and for an appeal both to the sheriff and coroner; and for an indictment in the cinque ports to the mayor and jurats; and for an indictment at an assise in a county palatinate to the chancellor of such county, who shall send for it to the justices of assise

See tit.
Record
(Q)

(C) *How it shall be certified.* In what Cases the Tenor of the Record shall be certified, and in what Cases the Record itself.

Hob. 135.
pl. 181.
S. C. &
S. P. ac-
cordingly.
See (A) pl.
1. S. C.
Hob. 135.
pl. 181.
S. C. &
S. P. ac-
cordingly.
—See (A)
pl. 1. S. C.

[1. *WHERE the court which awards the certiorari cannot hold plea upon the record itself, there only a tenor shall be certified, because otherwise if the record itself should be removed, there would be a failure of right afterwards.* Hill. 14 Jac. Banco. PIE AND THRILL.]

[2. *As in an information in banco upon the statute of recusants, if an indictment and conviction of the defendant to be a recusant is pleaded, and thereupon nul tiel record is pleaded, and a certiorari issues de banco to the justices of peace before whom the conviction was, the justices ought only to certify the tenor, because the common-pleas cannot hold plea upon the record itself if it should be removed.* Hill. 14 Jac. Banco, PIE AND THRILL, resolved.]

3. *If one brings debt on a recovery in an inferior court, as in a court of piepowders, &c. there it is not necessary for the party to have the record itself, nor the tenor of it; so if one brings debt in C. B. on damages recovered in B. R. or in the court of Norwich; but if nul tiel record be pleaded there, it is sufficient if the tenor of the record be removed into chancery by certiorari, and sent thence by mittimus.* F. N. B. 242. (B) in the new notes there (a) cites 7 H. 6. 19. See 19 H. 6. 79 & 80. Accordant Dyer 187.

4. *Where one is to sue execution of a record in another court, as where it is to sue execution in C. B. on a recovery in ancient demesne, or before justices of assize, or of oyer and terminer, there the record itself ought to be removed into chancery by certiorari, and the said record with the certiorari sent into C. B. by mittimus; and so if an attain is before sued on such a recovery,* 34 H. 6. 251. *But when execution is to be sued in C. B. upon a record which remains in the treasury there, as on a fine, recovery &c. (Note, all those records were removed into the receipt of the exchequer circa temp.*

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9 H. 4. 37 H. 6. 17.) *But where it is in the chancery, as on a petition among parceners, Dyer 136. there they will not send in the record itself, but a certiorari to the chamberlain and treasurer, and a mittimus of the tenor of the record. See the case 39 H. 6. 4. per Prifot. And if the tenor of the record be before the certiorari filed in chancery, they will not send the certiorari into the receipt (treasury), nor send in the tenor which is there filed, but only tenorem tenoris; and it seems that is sufficient.* 17 H. 6. 17. 28. F. N. B. 242. (B) in the new notes there (a).

5. *Note, when a man recovers, and has not execution, and the records are removed into the receipt or treasury, there the party who would have execution may sue certiorari out of the chancery to the chamberlain and treasurer, to certify the record in chancery, and when it*

it comes there, they may send it *by mittimus into B. R. if it came thence, and into C. B. if it came thence*, and there to sue execution; and per Moyle J. the chancery do not chuse to write for the record and process, but for the tenor of the record and process, and the justices of assize use to write for the record and process, and the same is said elsewhere for a fine levied; note a diversity. Br. Certiorari, pl. 1. cites 37 H. 6. 16.

6. If a man be *convicted before the sheriff upon a re-disseisin, and post-disseisin*, then he shall not be delivered out of prison without the king's special command, and then he ought to sue a *certiorari to remove the record into B. R.* and there to agree with the King for his fine. F. N. B. 190. (F).

7. Certiorari awarded out of B. R. directed *to the custos brevium of C. B. to remove a record of a fine levied in the time of P. & M.* The transcript whereof was only removed before by writ of error, and the error was found, and adjudged; and the intent of this certiorari was, that the record of the fine might be taken off the file, and cancelled in B. R. and upon precedents shewed, the certiorari was granted. D. 274. b. pl. 44. Pasch. 10 Eliz. Bourne v. Ruffell.

8. But where a certiorari issued *to the chief justice of C. B. to remove a record*, a verdict was given by nisi prius, and an attaint was brought against them in B. R. this certiorari was not allowed, no precedent being to be found of such writ; for the entry of the clerk of the treasury in C. B. does not say *quod recordum præd' removetur in B. R. virtute brevis de certiorando*, but only *virtute brevis de errore corrigendo sub magno sigillo Angliæ*; whereupon the party purchased a new certiorari out of chancery *pro tenore recordi* only, which was certified to the chancery accordingly, and sent thence into B. R. by mittimus. D. 274. b. 275. a. pl. 44, 45. Pasch. 10 Eliz. Bourne v. Ruffell.

9. *A. and B. were indicted for a murder. B. fled, and A. brings a certiorari to remove the indictment into B. R.* It was insisted that the whole record should be removed, and that there could be no transcript of it, because the writ was to certify *recordum & processum cum omnibus ea tangentibus*; but the chief justice doubted, and said that the opinion of Markham in one of our books is against it, and said it might be mischievous; for so the other might be attaint here by outlawry, who might know nothing of it. Mar. 112. pl. 190. Trin. 17 Car. Anon.

10. *In all counties except London the record itself is removed by a certiorari*; admitted per cur. Sid. 230. pl. 28. Mich. 16 Car. 2. B. R.

But they of London by their charter certify only tenor.

rem recordi; so that the record itself remains with them. Agreed. Sid. 155. pl. 5. Mich. 15 Car. 2. B. R. — Holt Ch. J. said that it is an error in the clerks in London, that upon a certiorari they return only the transcript, as if the record remained below; for in C. B. though they do not return the very individual record, yet the transcript is returned as if it were the record itself, and so it is in judgment of law. 2 Salk. 565. pl. 2. Hill. 8 W. 3. B. R. The King v. North. — The very record itself is to be removed in all places except London, where they are obliged only to send up the transcript; per Fortescue J. *Quod non fuit negatum*. Barnard. Rep. in B. R. Mich. 13 Geo. 1. Anon.

11. On a certiorari to return an order, it was returned thus; viz. *Cujus quidem tenor sequitur in hac verba*; and because it was not *Qui quidem ordo sequitur in hac verba*, it was quashed. 1 Salk. 147. pl. 10. Pasch. 1 Ann. B. R. The Queen v. the Parish of St. Mary's in the Devizes.

(D) Certiorari. Lies in what Cases.

Br. Certification of Assise, pl. 5. cites 21 E. 3. 3.

1. IF *assise pass in pais*, and be adjourned into bank, and judgment given there, the defendant cannot have certification of assise, nor attain there; but shall remove the record before the justices of assise again, and there he may have certification or attain. Quod nota; and it seems that the removing shall be by certiorari. But quære inde of the manner thereof. Br. Cause de Remover, pl. 16. cites 21 E. 3. 30.

2. If a man be indicted in the county of L. the king's bench shall not write for the body and the record upon surmise, but upon matter of record; but shall be removed into the chancery by certiorari, and sent into B. R. by mittimus. Br. Corone, pl. 192. cites 41 Aff. 22.

3. A. brings a writ of conspiracy against B. and others. This conspiracy was to indict A. of a felony, of which he was arraigned and acquitted. The defendants plead that the indictment was before certain justices of peace, who compelled the defendants to be jurors upon finding the indictment, and that they with others were jurors upon finding the said indictment, &c. The plaintiff replies nul tiel record. In this case the defendants have a day given them to bring in the record, and fail. The plaintiff has judgment. This judgment was reversed; for the court of C. B. ought to have awarded a certiorari to the justices of peace, to certify whether they have such a record; for they are an inferior court to the court of C. B. But in this case, where the court is superior, or the jurisdictions equal, day is given to the defendant to have the record in court by a certain day. By the justices of both benches. Jenk. 114. pl. 23. cites 4 H. 6. 23.

4. A certiorari is to remove a thing out of a court of record. Br. Admeasurement, pl. 6. cites 7 E. 4. 22.

Br. Re-attachment, pl. 27. cites S. C.

5. Writ is directed to the sheriff, and mesne between the teste and return the king died; and also it was a preremptory action which ought to be taken within the year, as appeal of death, or formedon against pernor, and the teste was within the year, but the return after the year; yet such writs in these cases were brought into bank by certiorari, and resummons or re-attachment awarded, which will save the year. Quod nota bene. Br. Certiorari, pl. 12. cites 10 E. 4. 13.

6. A man distrained by 20 sheep. The owner brought replevin, and the defendant affirmed plaint against him in a bafe court by covin, to have the sheep attached, so that replevin should not be made; by which the sheriff returned this matter and the plaintiff prayed superseas.

persedeas for him and his goods, because this court has the antient seisin; and had it for body, but not for goods; but per Laicon, he shall have for both; and by several he may have certiorari of all if he would. Br. Certiorari, pl. 17. cites 16 E. 4. 8.

7. Where a man had *cast protection after issue*, certiorari issued out of chancery to inquire whether he attended the business of the king or his own proper business, and certified that his own proper business; by which the chancellor granted *innotefcimus*, and the protection was repealed, and *resummons* awarded immediately. Br. Certiorari, pl. 14. cites 21 E. 4. 20.

8. Certiorari lies to remove *redisseisin, and post disseisin, and to remove record out of one county to have recovery in another county; and lies to remove record out of a franchise to the common law, to have execution in a foreign county, because the debtor has nothing within the franchise; and it lies to remove assise.* Br. Certiorari, pl. 18. cites F. N. B.

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9. And where record is so removed from one justice to another, there writ ought to be directed to the new justices to receive it. Ibid.

10. And it lies upon every record which is in the treasury to have it removed into the chancery, and sent into bank by *mittimus* to have execution upon it; for the justices of bank cannot award execution, if they have not the record before them. Ibid.

11. And where deed is denied, by which it remains in court, there the party, who should have it after, ought to have special writ to them, to have delivery thereof. And it lies to bring in record which is pleaded in bar in another court. And it likewise lies to have execution where the justices are removed, and new justices authorized. And it lies to remove statute staple to have execution thereof. And it also lies to have *tenorem recordi*, and in some case *tenorem tenoris*. And to remove record out of a franchise into another court. And to certify outlawry. It lies to remove record of acquittal of a felon. * And it lies to remove record before justices of oyer and terminer. And to have execution in a foreign county. And it lies to remove record to have charter of pardon upon it. And it lies to remove record to have it exemplified. And it lies to remove record to have attain.

And to remove record from the Marshalsea to have thereof attain. And it lies to remove record of fresh force. And it lies to the *custos brevium* to certify writs, warrants of attorney, &c. which concern the record or matter. And it lies to the justices of sewers to make certificate of their presentments, &c. And it lies to certify whether J. N. against whom exigent is awarded, be peer of the realm to have *supersedeas*; quod nota. And it lies to the escheator to certify records and inquisitions, or seizures for the king before him, or made for him. And it lies to certify the king in the chancery who last presented to such a benefice. And of the value of such fees and advowsons, &c. Br. Certiorari, pl. 18. cites F. N. B.

* The court has refused to grant a certiorari to remove a recognizance of appearance before justices of oyer and terminer, &c. because the court below is most proper to judge upon the whole circumstances of the case, which are equitably to be considered whether it ought to be

created or not. 2 Hawk. Pl. C. 288. cap. 27. f. 33.

Palm. 480.
Trin. 3 Car.
B. R. the
S. C. in to-
tidem verbia

12. A. was indicted of murder in Essex, and outlawed, and the *outlawry certified in B. R.* but as certified it is *erroneous*, because the *exactus* is *ad comitatum*, without saying *meum*. The attorney general shews that the *king had seized the lands, and for assuring the king's estate, and to prevent the reversal of the outlawry, prayed a certiorari to the coroners, whether the exactus was ad comitatum (without meum) and upon their return to amend it; and there was a precedent in the time of E. 4. where one Stanley was indicted, and was in some places wrote Stavely; and a certiorari was awarded here by the court. Lat. 210. Plume's case.*

13. Certiorari was denied to remove an *information* exhibited in the mayor's court of London against a wood-monger there, grounded *upon an act of common council*, unless such action had appeared to be against law; sed adjournatur to hear counsel of both sides. Sty. 211. Pasch. 1649. Anon.

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14. On a motion for a certiorari *to remove an indictment preferred against one in Newgate*, Roll Ch J. said, he lies there for murder, and is outlawed thereupon, yet take a certiorari to remove the record, for his *fact was the stabbing of a man, and stabbing in its nature is but felony, and is not murder*, although the party cannot have his clergy for it, by reason of the statute made by king James against stabbing, else by the common law he might have had it. Sty. 364. Hill. 1652. B. R. Anon.

15. The court was moved on behalf of the defendant, for a certiorari *to remove certain indictments preferred against him in London, for selling of leather, to the end he may have an indifferent trial notwithstanding the statute, which directs that the indictment be preferred in the county where the offence was committed.* Roll Ch. J. said, there the statute was made for the ease of the defendant, and therefore he may remove the indictment, otherwise he shall be in worse case than he was before the statute; therefore ordered a certiorari. Sty. 356. Mich. 1652. B. R. Anon.

16. 12 Car. 2. cap. 23. *No certiorari shall stay the proceedings of the justices in a cause concerning the excise.*

2 Hawk. Pl.
C. 287. cap.
27. f. 28.
says, it seems
that the
court will
not ordinari-
ly, at the
prayer of the
defendant, grant a certiorari for the removal of an indictment of perjury or forgery, or other heinous misdemeanor; for such crimes deserve all possible discountenance, and the certiorari might delay, if not wholly discourage their prosecution.

17. It was agreed by all the justices not to grant certiorari *to remove any indictment of perjury, forgery, or any such great misdemeanor, because it is a mischief commonly seen, that when it is removed by certiorari they never proceed here, and so the matter goes unpunished.* Sid. 54. pl. 19. Mich. 13 Car. 2. B. R. Anon.

But by 5 W.
& M. cap.
11. f. 6 if
any indict-
ment be a-
gainst any
person for not
repairing highways, causeways, pavements, or bridges, and the title to repair the same may come in question,

18. 22 Car. 2. cap. 12. f. 4. *All defects of repairs of causeways, pavements, highways, or bridges, shall be presented in the county, and no such presentment or indictment shall be removed by certiorari, or otherwise, out of the county, till such indictment or presentment be traversed, and judgment thereupon given.*

question, upon such suggestion, and affidavit made thereof, a certiorari may be granted to remove the same into B. R. provided that the parties prosecuting such certiorari shall find two manucaptors to be bound in a recognizance, with condition as aforesaid.

19. A conviction of forcible entry upon view of justices of peace may be examined upon a certiorari, but no writ of error lies upon it; per cur. Vent. 171. Mich. 23 Car. 2. Anon.

20. A fine was taken in Chester, which is a county palatine, by dedimus. Error was assigned, that no time is mentioned when the caption was taken, nor any commissioners named, and prayed that it might be amended. Wythens J. said, they would grant a certiorari to make a fine good, but not to reverse it; and a certiorari was granted *ad informandam conscientiam*. Comb. 26. Trin. 2 Jac. 2. B. R. Okey v. Hardistey.

21. 3 & 4 W. & M. cap. 12. s. 23. Enacts, that all matters concerning highways, causeways, pavements, and bridges, mentioned in this act, shall be determined in the proper county, and not elsewhere, and no presentment, indictment, or order, made by virtue of this act, shall be removed by certiorari out of the county into any other court.

Hawk. Pl. C. 218. cap. 76. s. 80. says, it has been resolved, that if the quarter-sessions, under pre-

tence of the jurisdiction given them by these statutes, take upon them to do a thing manifestly exceeding their authority, as to make an order on surveyors of the highways, to make up their accounts before a special sessions, their proceedings may be removed by certiorari into B. R. and there quashed; for the quarter-sessions have no manner of power given them to intermeddle originally with such accounts, but only by way of appeal; cites Mich. 12 Ann. the Queen v. Bramby.

22. 7 & 8 W. 3. cap. 6. No certiorari shall be granted to remove a suit for small tithes from the justices of peace, unless the title of the tithes comes in question.

2 Hawk. Pl. C. 289. cap. 27. s. 38. says, that in the con-

struction hereof it has been adjudged, that if the party insist on any matter of law before the justice of peace, which is any way doubtful, as on a custom in a parish to be discharged of a certain kind of tithe, &c. the order may be removed within the intent of the statute; and in the marg. there cites Hill. 6 Geo. the King v. Furnace.

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23. Indictment at Kirby in Westmorland on the 5 Eliz. for using a trade, not having been apprentice thereto 7 years, and a certiorari was prayed, but the court doubted whether to grant it, because the statute is, that it must be tried in the proper county, so that if it be removed hither, it must be sent down again by procedendo, and not filed here so as to be quashed; but there having been several such certioraries granted, they granted one in this case, and after granted another in a like case in Trinity term following, in the case of one Woods of Norfolk. 12 Mod. 188. Pasch. 10 W. 3. the King v. Haggard.

24. A certiorari lies upon a conviction of forcible entry upon the view of a justice of peace; per Holt Ch. J. in delivering the opinion of the court. Ld. Raymond. Rep. 469. Hill. 11 W. 3.

12 Mod. 390. S. C. & S. P. by Holt Ch. J. Carth. 491. 494. S. C. & S. P. accordingly, by Holt Ch. J. in delivering the opinion of

25. The censors of the college of physicians having power by their charter, confirmed by act of parliament, to fine and imprison for ill practice in physic, condemned, fined, and committed doctor Groenvelt for the same. Holt Ch. J. held, that a writ of error would not lie, it being a proceeding without indictment or formal judgment, and not according to the course of common law, but that

the court.
—12 Mod.
386. 390.
S. C. ac-
cordingly.

that a certiorari lies; for no inferior jurisdiction can be exempt from the superintendency of the king in this court. 1 Salk. 144. pl. 3. Trin. 12 W. 3. B. R. Dr. Groenvelt v. Burwell.

—Ld. Raym. Rep. 213. S. C. but S. P. does not appear. —Comyns's Rep. 76. 86. S. C. and S. P. held accordingly. —Ld. Raym. Rep. 469. S. C. and S. P. and cites Cro. E. 489. [pl. 6. Mich. 38 and 39 Eliz. B. R.] Long's case, where a certiorari was awarded to remove an indictment for felony, where the party convicted was burnt in the hand, but no judgment given, so that he could not have a writ of error; by Holt Ch. J. in delivering the opinion of the court.

26. It is unusual to send a certiorari without *special cause*. 7 Mod. 118. Mich. 1 Ann. Anon.

27. N. borrowed 600 l. of a feme covert, and promised to send her fine cloth and gold dust as a pledge. He sent her some coarse cloth worth little or nothing, but no gold dust. There was an indictment against N. at the Old Baily for *d cheat*. A certiorari was granted, because it was not a criminal matter, but it was the prosecutor's own fault to repose such a confidence in N. besides the defendant offered to try it that term, which would be a benefit to the prosecutor, who, by the course of the Old Baily, could not try it so soon. 1 Salk. 151. Pasch. 4 Ann. B. R. Nehuff's case.

28. A certiorari is not a writ of right; for if it was, it could never be denied to grant it; but it has often been denied by this court, who, upon consideration of the circumstances of cases, may deny it or grant it at discretion; so that it is *not always a writ of right*. 8 Mod. 331. Mich. 11 Geo. Arthur v. the Commissioners of Sewers in Yorkshire.

29. Where a man is *chosen into an office* or place, by virtue whereof he hath a temporal right, and is *deprived thereof by an inferior jurisdiction, who proceed in a summary way*; in such case he is intitled to a certiorari *ex debito justitiæ*, because he hath no other remedy, being bound by the judgment of the inferior jurisdiction. 8 Mod. 331. Mich. 11 Geo. Arthur v. the Commissioners of Sewers in Yorkshire.

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Barnard.
Rep. in B.
R. 7. The
King v.
Chipping-
Norton, S.
C. says the
indictment
was for fe-
lony against
a clergyman,
for only tak-
ing a hand-

ful of hay out of a barn, which it was sworn was but of the value of a penny, and they swore it was nothing but a malicious prosecution. And the case of the King and Powell was cited, where a certiorari went to remove an indictment out of the sessions of the county of Sarum. The court said they never did grant such certiorari but upon a particular occasion; but they made a rule to shew cause, and at the last day of the term they granted it.

30. It was moved for a certiorari to remove an indictment found against the defendant for a felony, in stealing some hay, from the quarter-sessions of the peace held for the town and corporation of Chipping-Norton, upon affidavits that the defendant could not have a fair trial there; and he cited a case between THE KING AND POWELL, where a certiorari was granted to remove an indictment from the quarter-sessions of the peace for Salop for the like reason; and a rule was made for the prosecutor to shew cause, which was afterwards made absolute. 2 Ld. Raym. Rep. 1452. Mich. 13 Geo. The King v. Fawle.

31. The defendant was indicted at the Old Baily, and motion was made for a certiorari to remove the indictment here; for that he
was

was a person of distinction: But the court said they would never do it upon that account; for that would occasion great confusion. They said, in some cases they did grant them; as where it appeared that the fact could not support an indictment, as it was done in the case of SIR HUMPHREY MACKWORTH, who was indicted at the Old Bailey for forgery; for that he, being governor of a company, set the seal of the company to a deed without authority; there, as it appeared to the court that that fact was not indictable, they did grant it: Barnard. Rep. in B. R. 5. Mich. 13 Geo. The King v. Pusey.

(E) Necessary. In what Cases.

1. WHEN a justice is discharged, or his authority ceases he cannot certify a warrant in his hands without certifying it by writ, and so if he be made justice again, because his power was once ceased; and so it seems of other records in his hands. Br. Record, 641 cites 8 H. 4: 5.

2. Justices of the peace shall not bring into B. R. any record but that which is executory, and no acquittal of felony which is executed; but this shall come in by writ by certificate thereof. Br. Record, pl. 59: cites 8 E. 4: 18:

cord which is executed, as by acquittal, &c. can be brought into a higher court without a writ; and that it seems agreed that if a justice of peace, or other judge of record, having taken a recognizance or inquisition, or recorded a riot, or done any other executory matter within his jurisdiction, and have still continued in the same commission, &c. without any interruption, the court of B. R. shall receive such record from his hands without any writ of certiorari.

2 Hawk. Pl. C. 290. cap. 27. f. 44. says it seems agreed that no record

3. Several judges in their circuits took several verdicts, and dying in the vacation before the return of the positeas, these verdicts shall be received by the hands of the clerk of the assizes; and this is a better way than to award a certiorari for those verdicts to the executors of the judges; for the clerk of the assizes was a sworn officer. Also the entry shall be in the common form, viz: Postea ad quem diem venerunt partes & justiciarii ad assisas capiendas coram quibus, &c. hic miserunt recordum suum; and against this entry of record no averment can be received that the judges were dead before the delivery of the positea; for this would be contrary to the record; by all the judges of England. Jenk. 216. pl. 59:

D. 163. a. pl. 54. Trin. 4 & 5 P. & M. Anon. — The clerk of the assizes may bring in the indictment pro priis manibus, if he pleases, without a certiorari; per Bramston Ch. J. Mar. 112,

113. pl. 190. Mich. 17 Car. Anon. — 2 Hawk. Pl. C. 290. cap. 27. f. 44. S. P. and says it seems to be agreed; but says that the executors or administrators of a judge can in no case bring in a record without a writ to authorize them to do it. And it seems to be the stronger opinion, that neither a justice who is out of commission at the time, nor one who has been out of commission but is afterwards restored, can certify any record without a writ of certiorari.

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4. It was said by Coke, that the chancellor, or any judge of any of the courts of record at Westminster, may bring a record to one another without a writ of certiorari, because one judge is sufficiently known to another; but that other judges of inferior courts, nor justices of peace, cannot do so. Godb. 14. pl. 21. Pasch. 24 Eliz. B. R.

(F) At what Time.

1. **NOTE** per Catesby J. where *certiorari with mittimus* comes to remove a fine, and the writ bears date before that the fine comes into chancery, yet is good. Br. Certiorari, pl. 19. cites 1 R. 3. 4.

On a motion for a certiorari to remove an indictment

2. So of certiorari to remove indictments, which indictment bore date after the certiorari. Ibid. and cites Fitzh. Recordare, pl. 6.
into B. R. against several Frenchmen for a robbery; but at the time of the motion there was no indictment before a judge of assize, Keeling Ch. J. said, you may have a certiorari; but it must not be delivered till the indictment be found, and then the judge has the prosecutors there, and may bind them over, and so the trial may be here. Mod. 41. pl. 91. Hill. 21 & 22 Car. 2. B. R. Anon.—Vent. 63. Lampereve & al' S. C.

3. It was moved for a certiorari to remove an indictment of forcible entry, that was once before removed hither, and after sent down by a procedendo, because the justices below will not grant restitution. Roll Ch. J. answered, there is a plea put in, and in such case it is not usual to grant a certiorari, yet it may be, that it may be granted, therefore ordered that the other side shew cause why it should not be granted. Sty. 300. Mich. 1651, B. R. Anon.

4. A certiorari to remove an indictment of perjury at the sessions, was delivered to the justices after the same was returnable. The court inclined that nothing can be removed by certiorari after the return. Keb. 944. pl. 3. Hill. 17 and 18 Car. 2. B. R. The King v. Rhodes.

1 Keb. 81. pl. 78. The King v. Maxie, S. C. — But it may be granted after conviction, in order to give the party, the right of whose freehold is concerned therein, an opportunity so far to traverse it. 2 Hawk. Pl. C. 288. cap. 27. f. 32.

5. Where a matter inquirable and punishable by the regards of a forest only, is presented before the justices in eyre; the court of B. R. resolved that they would not grant a certiorari upon such presentment, till after conviction there, and that because such offences against the forest law should not go unpunished. Sid. 296. pl. 19. Trin. 18 Car. 2. Norfolk (Duke) v. Newcastle (Duke.)

2 Hawk. Pl. C. 294. cap. 27. f. 64. S. P. — At the time an indictment was trying, a certiorari came down

6. N. the defendant was indicted before justices of peace, and pleaded not guilty; and after the jury were gone to consider of their verdict, he delivered in a certiorari, and the justices returned their verdict, and held good; for it cannot be delivered after the jury is sworn. 1 Salk. 144. pl. 1. Hill. 8 W. 3. B. R. The King v. North.

from the court of chancery returnable in B. R. The court said that that certiorari was void. Barnard. Rep. in B. R. 105. Mich. 2 Geo. 2. The King v. Steers. — See tit. Habeas Corpus (E) pl. 2.

7. Certiorari to remove indictments, must be delivered before the jury is sworn; per Holt Ch. J. Cumb. 391. Mich. 8 W. 3. B. R. Anon.

8. After

8. After a warrant awarded to distrain, and distress made, upon a conviction for deer-stealing, a certiorari was brought to remove the conviction; and after the record was removed the constable sold the goods, but would not part with the money, nor return his warrant. The court held that the constable might proceed in the execution after the certiorari, because it was begun before; for a certiorari is no more a superseas than a writ of error on a judgment in C. B. to stay the execution on a fi. fa. already begun; that B. R. have no power over this warrant, because it was granted before the certiorari issued, therefore they refused to make a rule on the constable to return it, but said, that the justices might fine him if he did not return it, or pay the money to the prosecutor. 1 Salk. 147. pl. 12. Mich. 1 Ann. B. R. The Queen v. Nash.

6 Mod. 83. Mich. 2 Ann. Morley v. Stackler, S. P. [and as I remember was S. C. and that Nash was the constable, and Morley the prosecutor, and Stackler the deer stealer.]

9. A rule was made that no certiorari shall be granted to remove any orders of justices, from which the law has given an appeal to the sessions, before the matter is determined on the appeal; and if an order should be removed before appeal, it should be sent down again; but if the time of appeal be expired, that case is not within that rule; per Holt Ch. J. Ann. 1 Salk. 147. pl. 12. Pasch. 1 Ann. B. R.

But afterwards it was held that advantage must be taken of this rule, upon the motion to file the order; for that after

it is filed, it is too late. Ibid. cites Mich. 4 Ann. B. R. the case of the inhabitants of Shellington.

10. It is a rule of court that no order of justices, whereof an appeal lies, be brought into B. R. by certiorari till after [the matter be determined on the] appeal, and if any be, that it be sent back by procedendo; for the original order does not come up, but the tenor of it, as appears by the very words of the return. 7 Mod. 10. Pasch. 1. Ann. B. R. Anon.

1 Salk. 147. pl. 11. same rule, but says that afterwards as in Mich 4 Ann. B. R. in case of Shellington

inhabitants, it was held that advantage must be taken of the rule upon motion to file the order; because after it is filed, it is too late.

11. The defendant being convicted on an indictment on the statute 14 Car. 2. for beating certain officers, &c. obtained a certiorari to remove the indictment into B. R. and upon a motion by the attorney-general for a procedendo, it was insisted that a certiorari was not proper after conviction, and before judgment; because the justices who tried the fact were the most proper to set the fine. But per cur. this writ lies after conviction and before judgment, &c. because in some cases a writ of error will not lie, but in this it will; because the proceedings were grounded on an indictment, and therefore the party grieved might have a remedy by a writ of error, and for that it may not be so proper in this court to set the fine, a procedendo was granted. 1 Salk. 149. pl. 15. Mich. 2 Ann. B. R. The Queen v. Porter.

6 Mod. 17. The Queen v. Botheil, seems to be S. C. & S. P. held by Holt Ch. J. accordingly. — S. P. by Holt Ch. J. accordingly, and cited the case of Lisle and Armstrong, on an indictment of

murder, and a case from Gloucester on an indictment for words, to the end that B. R. might give the judgment for the greater example; and said that they usually grant a certiorari where it appears that it is such conviction on which no writ of error lies; but though we may grant a certiorari, yet we will consider whether it be proper or not; and therefore since the defendants have stood a trial before the justices, [viz. for beating a custom-house officer] it is reasonable that the justices give judgment also, and let the defendants bring their writ of error if they think fit; and to this Powell J. agreed. 2 Ld. Raym. Rep. 937. Trin. 2 Ann. The Queen v. Potter & al S. C. — Holt Ch. J. held, that

that if a judge of assize upon a conviction there, doubted of the judgment, he might remove the record into B. R. by certiorari; and upon judgment given here, a writ of error of a record coram vobis residens would lie. 1 Salk. 149. pl. 15. Mich. 2 Ann. B. R. in case of the Queen v. Porter.

2 Hawk. Pl. C. 288. cap. 27. § 31. says it seems agreed, that a certiorari shall never be granted to remove an indictment or appeal after a conviction, unless for some special cause; as where the judge below is doubtful what judgment is proper; for unless there be some such reason, the judge who tried the cause shall not be prevented from giving judgment in it; for it cannot be intended but that he is best acquainted with the circumstances of it, and consequently best able to judge what fine or other punishment is proper for it.

(G) One or more Writs.

1. **T**HE cognisee of a statute-merchant sued a certiorari directed to the mayor, &c. before whom it was acknowledged, and thereupon a *capias* issued against the cognisor; and upon non est inventus returned, the cognisee brought an *alias capias*, but died before it was returned. It was a question whether his executor should have a *sci. fa.* against the cognisor, or a new certiorari to the mayor, &c. The party was advised to begin *all de novo*, as the best method. D. 108. b. pl. 49. Pasch. 2 Eliz. Anon.

S. P. in error assigned for want of a writ of inquiry, and return was, that none was filed of that term; but after-

2. A certiorari was awarded and returned, that there was not any warrant of attorney entered for the plaintiff in that term wherein the action was commenced, and judgment given. It was surmised to the court by the defendant in error, as *amicus curie*, that there was warrant of attorney for another term, and prayed a new certiorari; and all the court held that he might well have it. Cro. J. 277. pl. 7. Pasch. 9 Jac. B. R. Smith v. Skipwith.

wards the defendant in error filed it as of that term, and takes out a certiorari himself, which was returned that it was filed; whereupon the plaintiff's counsel moved to quash the second certiorari. The court said that they ought to have entered a caveat to have prevented its being filed; but however made a rule to shew cause. Barnard. Rep. in B. R. 12. Pasch. 13 Geo. 1. Shipman v. Lethalier.—Ibid. 14. S. C. says, the certiorari taken out by the defendant, was before in *nullo est erratum* pleaded; and the court said that as here are 2 inconsistent returns, they would certainly take that which made in affirmation of the judgment. And the court agreed that the parties may take out as many certioraries as they please before in *nullo est erratum* pleaded, but after that they cannot take any out but upon motion; and that the court will grant those *ad informandum conscientiam curie*.

3. One person shall have but one certiorari, but several persons may have several writs to certify; per cur. Cro. J. 597. pl. 20. Mich. 18 Jac. B. R. Johns v. Bowen.

4. Debt in B. R. upon a judgment in C. B. The defendant pleaded nul tiel record, and thereupon a certiorari was awarded, to certify the record returnable immediately. After 8 days expired, and no record certified, the court was moved for an *alias certiorari* with a penalty, which was granted. Palm. 562. Trin. 4 Car. B. R. Saltingstall v. Garraway.

5. Upon error brought of a judgment upon non sum informatus in C. B. The error assigned was, that it appeared by the record, that the declaration was before the plaintiff had any cause of action. It was said, if it be so, then there is a wrong original certified; wherefore a new certiorari was awarded to have the true original certified. Sty. 352. Mich. 1652. Jennings v. Downes.



6. It was moved to quash a certiorari, because it was *in the preter-perfect tense*. The court was unwilling to quash it, till they had advised whether an alias certiorari might be awarded, and the doubt was because in all counties but London the record itself is removed, and so no 2d certiorari; but some thought the record here not removed by the first certiorari, but only a history that there was such a record, and that therefore a 2d certiorari should issue; but after several debates it was adjourned as to this point. Sid. 229. pl. 28. Mich. 16 Car. 2. B. R. The King v. Brown & al.

7. Nota, If a certiorari be not returned, so that an alias be awarded, the return must be as upon the first writ, and the other must be returned *quod ante adventum istius brevis* the matter was certified. Vent. 75. Pasch. 22 Car. 2. B. R. Anon.

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8. A certiorari was granted *to remove an order concerning money given and collected for repair of a bridge, but through the carelessness of the attorney the writ was not delivered in time*, and so a procedendo went. The court was moved for a new certiorari, and said that in *Thesaurus Brevium* are several precedents of an alias certiorari to remove an indictment upon an insufficient return to the first, and this is no more, and that there are several in the office of this kind; but the court told them it was their own fault not to deliver the first, and refused to help them. 2 Show. 330, 331. pl. 341. Mich. 35 Car. 2. B. R. The King v. Weaver.

9. A certiorari was granted, but the return thereof *was quashed for some irregularity*, and thereupon the court was moved for another certiorari; one of the judges opposed the granting it, because the removal of the orders by virtue of the certiorari would not determine the right of the plaintiff (who had been chosen clerk to the commissioners of sewers by some of the commissioners, but was turned out by others), which was the reason of quashing the return of the former certiorari; but by the other three judges the certiorari was granted. 8 Mod. 331, 332. Mich. 11 Geo. 1. Arthur v. Commissioners of Sewers in Yorkshire.

(H) Obtained or granted. How and by whom.
In what Cases, and wherefore.

1. 1 & 2 P. & M. NO writ of certiorari shall be granted to cap. 13. remove any prisoner out of any gaol, or to remove any recognizance, except the same be signed by the proper hands of the chief justice, or in his absence, by one of the justices of the court out of which the same writ shall be awarded, on pain of 5l. to be paid by any one that writeth such writ not being so signed.

2. 21 Jac. 1. cap. 8. s. 5 & 6. Whereas indictments of riot, forcible entry, or assault and battery, found at the quarter-sessions, are often removed by certiorari, all such writs of certiorari shall be delivered at some quarter-sessions in open court; and the parties in-

Certiorari is not to be allowed, without putting in sureties in open

court; yet if the party will not, the clerk of the peace must return it, and that the parties did not put in

sureties, as Twissden said was adjudged in the time of Judge Bacon, and for not returning it the court granted an attachment; also the statute extends not to indictments of forcible entry, but only to riots, &c. as hath been conceived, and the justices cannot make any order against returning it. Keb. 225. pl. 38. Hill. 13 Car. 2. B. R. The King v. Mucklow.

If a certiorari be awarded to justices of peace to certify an indictment of riot, or forcible entry, or other indictment of which the stat. 21 Jac. cap. 8. says that they ought not to be certified without bail first taken, though the party will not give bail according to the statute, yet the justices ought to make a return of the certiorari. Sid. 70. pl. 7. Hill. 13 & 14 Car. 2. B. R. a note there. — 2 Hawk. Pl. C. 292. cap. 27. s. 51. S. P. says the justices will be in contempt if they make no return to it; for all writs must be obeyed, unless good cause be shewn to the contrary, and the proper way of shewing it is to return it.

[351] 3. Two men and their wives were indicted upon the statute of forcible entry. They brought a certiorari to remove the indictment, and one of them refusing to be bound to prosecute according to the statute 21 Jac. cap. 8. the said justices, notwithstanding the certiorari, proceeded to try the indictment; but it was resolved, that where one of the parties offers to find sureties, although the others will not, yet the indictment shall be removed, though the other refuses; and that where the statute says the party indicted shall be bound in the sum of 10l. with sufficient sureties, as the justices shall think fit, yet if the sureties are worth 10l. the justices cannot refuse them. And further resolved, that after a certiorari brought, and a tender of sufficient sureties, according to the statute, all the proceedings of the justices of peace are coram non judice. Mar. 27. pl. 63. Trin. 15 Car. Anon.

Mar. 27. pl. 63. Anon. S. P. and seems to be S. C. 4. A *feme covert* is not within the statute of 21 Jac. to find sureties. 2 Hale's Hist. Pl. C. 213. cites it as resolved 'Trin. 15 Car. 1. B. R. Hancock's case.

5. On a motion for a certiorari, on behalf of Ld. Morley, to remove an indictment against him at the sessions upon the statute against hearing mals. The court said they did not see how a certiorari could be granted at the * prayer of the party, but that it might be at the prayer of the counsel for the state. Sty. 295. Mich. 1651. Ld. Morley's case.

Twissden J. said he never knew such motion made by any but the king's attorney or solicitor. — It has been adjudged that a certiorari is by law grantable for an indictment; for the court is bound of right to award it at the instance of the king, because every indictment is the suit of the king, and he has a prerogative of suing in what court he pleases. But it seems to be agreed, that it is left to the discretion of the court either to grant or deny it at the prayer of the defendant; and agreeably hereto it is laid down as a general rule, that the court will never grant it for the removal of an indictment before justices of good-delivery without *some special cause*, as where there is just reason to apprehend that the court below may be unreasonably prejudiced against the defendant; or where there is so much difficulty in the case, that the judge below desires that it may be determined in B. R. or where the King himself gives a special direction that the cause shall be removed; or where the prosecution appears to be for a matter not properly criminal. 2 Hawk. Pl. C. 287, cap. 27. s. 27.

2 Hale's Hist. Pl. C. 212, 213. 6. If any of the persons indicted put in security, the indictment must be removed for all, because it is only to secure costs; by Twissden

Twisden and curiam; and Sir Humphry Mildmay was fined for not returning such certiorari; and *the hands of the justices need not be set to it* no more than the sheriffs by return of the undersheriffs; and an habeas corpus, though not to be allowed if under 5l. yet it must be returned that it is under 5l. Keb. 231. pl. 51. Hill. 13 Car. 2. B. R. The King v. Mucklow.

The record ought to be removed into B. R. adjudged Mich. 1653. B. R. — Ibid. 213. cites Trin. 15 Car. 1. Hancock's case, S. P. resolved.

7. Twisden J. declared that there is a rule made among the judges, when any one *prays a certiorari at a judge's chamber, to remove an indictment out of London or Middlesex*, he ought to give notice of his desire to the other side *three days before*, or otherwise the certiorari is not to be granted. Raym. 74. Pasch. 15 Car. 2. B. R. Stamford (Earl of) v. Gordal.

8. 5 & 6 W. & M. cap. 11. s. 2. *No certiorari to remove a cause from the sessions in term-time, but upon motion and rule of court of B. R. defendant to give security to plead to issue, &c. and try the cause the next assizes. Recognizance to be returned with the certiorari into the court of B. R.*

9. S. 4. *In the vacation a writ of certiorari may be granted by any of the justices of B. R. whose name, with the name of the party procuring it, shall be indorsed on the writ; and such recognizance, as aforesaid, shall be entered into before the allowance thereof.*

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10. S. 5. *The same law as to granting certiorari in the counties palatine.*

11. 8 & 9 W. 3. cap. 33. s. 2. *The party prosecuting any certiorari to remove an indictment from the quarter-sessions, may find two manucaptors to enter into a recognizance before any of the justices of B. R. in the same sum, and under the same condition as is required by the act 5 & 6 W. & M. cap. 11. whereof mention shall be made on the back of the writ, under the hand of the justice who took the same, which shall be as effectual to stay proceedings as if taken before a justice of peace in the county; and it shall be added to the condition of the recognizance, that the party shall appear from day to day in B. R. and not depart till discharged by the court.*

12. A scire facias was brought on a recognizance taken before a judge upon granting a certiorari to remove an indictment from the sessions of the peace, which upon oyer was entered in hæc verba; and was for 40 l. whereas the sum prescribed by the statute is 20 l. And per Holt Ch. J. before 5 & 6 W. & M. cap. 11. any judge might take a recognizance, which is not taken away; but if it be not according to the statute, which is in 20 l. the certiorari will be no superfeedas; yet whether it be or no, it is still good as a recognizance at common law, 2 Salk. 564. Pasch. 1 Ann. B. R. The Queen v. Ewer.

These statutes being in the affirmative, as to the taking of recognizances, do not take away the power which the justices of B. R. have by the common

law of taking recognizances upon their granting certioraries; from whence it follows, that if any such justice granting a certiorari shall take a recognizance variant from that prescribed by the act, either as to the sum or condition, &c. such recognizance will have the same force as it would have had if these statutes had not been made; but it is said that the certiorari, if procured by the defendant, will not in such case be a superfeedas to the proceedings below, as it would have been at the common law; for the statutes seem to be express that the sessions may proceed, notwithstanding any certiorari procured by a de-

pendant, whereon such recognizance is not given as is expressly prescribed. 2 Hawk. Pl. C. 291, cap. 27. f. 53.

6 Mod. 17. 13. A certiorari, to remove an indictment, had *no bail indorsed* on it, and therefore the court said that it should not have been allowed; for it was against the late act of parliament. — Ibid. 33. 1 Salk. 149. pl. 14. Trin. 2 Ann. B. R. The Queen v. Bothell. Mich. 2 Ann. that without giving bail to try it according to the statute, it is no superfluous.

3 Salk. 80. 14. It was held that in writs of certiorari granted *to remove orders*, the fiat for making out the writ must be signed by a judge, and the writ itself need not; but in case of writs of certiorari to remove indictments, the fiat must be signed and the writ too, and that the latter is required by the late act of parliament. And Holt Ch. J. said that if the fiat had been signed on the same day the writ was taken out, that would have been well, because it was before the essoign-day; but a fiat signed this term cannot warrant a certiorari tested the last day of last term. 1 Salk. 150. pl. 19. Pasch. 4 Ann. B. R. The Queen v. White.

15. The court said, that they had lately agreed to a rule, that no certiorari should be granted by a judge at his chambers in term time. Barnard. Rep. in B. R. Mich. 2 Geo. 2. The King v. Steers.

16. 5 Geo. 2. cap. 19. f. 2. No certiorari shall be allowed to remove any order, unless the party prosecuting shall enter into a recognizance with sureties, before one justice of peace where such order shall have been made, or before one of his Majesty's justices of B. R. in the sum of 50 l. with condition to prosecute without wilful delay, and to pay the party, in whose favour such order was made, within one month after the said order shall be confirmed, their costs to be taxed; and in case the party prosecuting such certiorari shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall be lawful for the justices to proceed and make further orders, as if no certiorari had been granted.

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17. 8. 3. The recognizances to be taken as aforesaid, shall be certified in B. R. and filed with the certiorari and order removed thereby; and if the order shall be confirmed, the persons entitled to such costs, within one month after demand made, upon oath made of the making such demand and refusal of payment, shall have an attachment for contempt, and the recognizance shall not be discharged until the costs shall be paid, and the order complied with.

18. 13 Geo. 2. cap. 18. f. 5. No writ of certiorari shall be allowed to remove any conviction, judgment, order, or other proceedings before any justice or justices of peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof, unless such certiorari be moved or applied for within six calendar months next after such conviction, &c. and unless it be duly proved upon oath, that the party suing forth the same has given six days notice thereof in writing to the justice or justices before whom such conviction, &c. shall be made, to the end that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall think fit, against the granting such certiorari.

(I) Removed by it. What is, or should be. And how. And what is a good Removal.

1. *Recipe quod reddat* is brought in London, &c. The tenant vouched foreigner to warranty; the plea shall be removed by certiorari, and after the warranty determined it shall be remanded. Br. Certiorari, pl. 16. cites 11 H. 4. 26, 27.

2. But where the action is brought in bank, and L. has consuance of the plea, and fails the party of right in their franchise by foreign voucher, foreign plea, or otherwise, the re-summmons lies to reduce it into bank; for there it never shall be remanded into the franchise; per Hill and Hank. For consuance is granted upon condition, *quod celeris fiat justitia, aliquin redeat*. Ibid.

3. The records of assise may be removed into chancery upon exchange of the justices, and to be sent to the new justices by mittimus. Br. Certiorari, pl. 20. cites F. N. B. 242.

4. And deed demed in one court, may be so removed into another court. Ibid.

5. It is said, that there is no certiorari in the register to remove record out of a court into C. B. immediately; but, as it seems, it shall be certified in the chancery by surmise, and then to be sent into bank by mittimus, which matter was agreed in the chancery. Br. Certiorari, pl. 20. cites 36 H. 8. & F. N. B. 242. Br. N. C.
pl. 278.
cites S. C.

6. Scire facias; note, that where the plaintiff in assise in ancient demesne had recovered the land and damages; and because the defendant had nothing there to render the damages, he removed it into chancery by certiorari, and sent it by mittimus into C. B. and there had scire facias to have execution upon it; quod nota; and so see, that after judgment no other writ lies to remove record but only certiorari, though it be recovered in a base court. Br. Certiorari, pl. 4. cites 39 H. 6. 3, 4.

7. A judgment given in the court at Dimchurch, being a member of the cinque ports, was removed by certiorari into B. R. and a sci. fa. issued against the defendant, to shew cause why the plaintiff should not have execution, and there being an alias certiorari in this case, the defendant demurred, for that it was *sicut prius*, when it ought to be *sicut alias*, but the exception was disallowed, and the plaintiff had judgment. Sty. 9. Pasch. 23 Car. Rook v. Knight. [354]

8. An indictment of battery was found at the sessions *billa vera*, and the party entered into a recognizance to go to trial there the next sessions; and this being shewn for cause why the certiorari should not be granted, Roll Ch. J. said, that the recognizance also may be removed by the certiorari, and thought there could be no hurt if the indictment be removed, and the trial had at the assizes, and should it be removed into B. R. they would not quash the indictment, but the party shall plead and carry it down, and try it at the next assizes at his own charge. Sty. 328. Pasch. 1652. B. R. Anon. Though the certiorari removes the recognizance to appear before the justices of assize, &c. yet that does not excuse his appearance, but he ought to appear

and procure his appearance to be recorded, and he must likewise deliver the writ; for purchasing such a writ

a writ only is not sufficient; and judgment accordingly. Cro. J. 281. pl. 2. Trin. 9 Jac. B. R. Rolfe v. Pye. — Bulst. 155. S. C. adjudged accordingly. — Yelv 207. S. C. adjudged accordingly. — Hawk. Pl. C. 294. cap. 27. §. 65. says, that this opinion seems supported by the better authority, though it has been holden otherwise, as in 2 Roll. Abr. 492. (F) pl. 12. and Dalt. cap. 75.

Comb. 199. 9. After a writ of *error* upon a judgment in C. B. and the judgment affirmed, the plaintiff in the original action moved for a certiorari to remove into B. R. the recognizance taken in C. B. upon the allowance of the writ of error, in order to bring a sci. fa. against the bail. It was objected, that B. R. could not grant such a certiorari, because the recognizance is a record, and therefore not to be removed by such a writ, for that removes only tenorem recordi; but on the other side a diversity was taken between bail taken in inferior courts where it is upon the roll itself, and for part of the record, and where in the courts of Westminster; for there the recognizance is taken by itself, and is part of the record on the roll, and therefore may be removed by certiorari though the record itself cannot, and it was granted accordingly. 4 Mod. 104. Pasch. 4 W. & M. in B. R. Barisdale v. Drew.

Drew v. Barisdale, S. C. the court were of opinion, that a sci. fa. might well be brought in B. R. on a recognizance removed hither out of C. B. by certiorari, and that by reason of some precedents shewn them at their chambers. — Show. 343. 345. S. C. says, the court, after deliberation, and search into precedents, had account of 7 or 8 in all, the first 30 years since, but none on debate; however, they ruled it good, for this reason, as I suppose, because ampliat jurisdictionem, and is no prejudice to the suitors, but rather an advantage, because no writ of error lies from hence upon such scire facias, but in parliament.

6 Mod. 61. 10. A certiorari after conviction ought to be to remove the indictment and conviction, and if it mentions the indictment only and not the conviction, it may be quashed; and if the party takes it out before conviction, but will not use it till after, he ought to lose the benefit of it. 1 Salk. 150. pl. 17. Hill. 2 Ann. B. R. The Queen v. Dixon.

S. C. & S. P. per cur. and that so it is if he will not use it till after the jury sworn; and the writ was quashed, and a new one granted to remove the indictment, and conviction thereupon, and ordered them to make it special, and to give the prosecutor a day thereupon above. — 3 Salk. 78. pl. 1. S. C. — 2 Ld. Raym. Rep. 971. S. C. & S. P. per Holt Ch. J. accordingly.

3 Salk. 78. 11. On a certiorari to remove an indictment after conviction by verdict, a day in court ought to be given to the party. 6 Mod. 61. Mich. 2 Ann. B. R. The Queen v. Dixon.

pl. 1. S. C. & S. P. — 1 Salk. 150. pl. 17. S. C. but S. P. does not appear. — 2 Ld. Raym. Rep. 971. S. C. & S. P. accordingly.

12. A certiorari was quashed, because it was directed *justiciariis ad pacem assignatis*, omitting the words *ad conservandam*. 11 Mod. 172. pl. 10. Pasch. 7 Ann. B. R. The Queen v. Jay.

[355] (K) Returned or certified. By whom and how,
And false Return punished how.

1. I^N debt upon exigent, the sheriff returned *quarta exactus*; the plaintiff averred that the defendant is duly outlawed. Certiorari shall be directed to the coroners, to certify whether he

is outlawed or not; and if they *certify that he is outlawed*, it shall be taken for perfect record that the defendant is outlawed, and the sheriff shall be amerced. Br. Certiorari, pl. 2. cites 36 H. 6. 24.

2. If *assise* is taken before the one justice of assise, the clerk of the assise not expecting the coming of the other justice of assise, yet the other justice by certiorari may certify the same record. Br. Record, pl. 81. cites 11 H. 7. 5.

3. A certiorari was directed to two clerks of the parliament to certify the tenor of an act of parliament concerning the attainder of the duke of Norfolk, and one of the clerks made the return. The question was, if the return was good, since one alone had no warrant to certify. See D. 93. a. pl. 24. Mich. 1 Mar. The Duke of Norfolk's case.

Upon diminution alleged, a certiorari issued to A. and B. justices of the grand sessions of Anglesey.

which is returned by one of them by his proper name, and well. D. 93. a. Marg. pl. 24. cites 3 Jac. E. R.

4. Debt on a recovery in *Bristow*; it was traversed and certified under the seal of *Bristow*; it was moved that it should have been certified under the great seal, but the court held that it was well enough; for such is the course upon certiorari directed to inferior courts. Cro. E. 821. pl. 17. Pasch. 43 Eliz. B. R. Butcher v. Aldworth.

2 Hawk. Pl. C. 294. cap. 27. s. 70. S. P. and says that if such court has no proper seal, it

seems that the return may well be made under any other.

5. Certiorari to the recorder cannot be returned by the deputy recorder in his own name. Sty. 98. Pasch. 24 Car. B. R. Thin v. Thin.

But if it be directed to a recorder who is a

custos brevium, or to a recorder and his deputy, then it is good. Ibid.

6. Certiorari to remove a record *coram R. F. & sociis suis*. The record is certified by R. F. and one other, and 3 justices held this well enough; but Twissden e contra. Keb. 282. pl. 86. Pasch. 14 Car. 2. B. R. Reeve v. Brown.

It was moved to quash a return to a certiorari, directed to 2 justices of

peace, because it was only made by one. But the court over-ruled the exception, because they are judicial officers; upon which he took 2 others, viz. that the return was in *English*, and likewise upon parchment; and both those courts allowed, and made a rule upon them to make another return, for this they said was none. Barnard. Rep. in B. R. 113. Hill. 2 Geo. 2. The King v. the Inhabitants of Darlington.

7. Exception was taken upon a conviction of one for carrying of a gun, not being qualified according to the statute, because it was before such an one justice of the peace, without adding *nec non ad diversas felonias, transgressiones, &c. audiend' assign'*. And the court agreed so it ought to be in returns upon certioraries to remove indictments taken at sessions; but otherwise of convictions of this nature, for it is known to the court, that the stat. gives them authority in this case. Vent. 33. Trin. 21 Car. 2. B. R. Anon.

8. Nota, if a certiorari be not returned, so that an alias be awarded, the return must be as upon the first writ, and the other

must.

must be returned *quod ante adventum istius brevis*, the matter was certified. Vent. 75. Pasch. 22 Car. B. R. Anon.

9. All certioraries, though *directed to divers justices*, may be returned by one, and so is the usual practice; per Asty. Cumb. 25. Trin. 2 Jac. 2. B. R. Anon.

5 Mod. 149—

Hill. 7

W. 3.

The King

v. the In-

habitants of

Wootton Rivers, S. C.—2 Hawk. Pl. C. 295. cap. 27. s. 75. says that whatsoever matters are put into the return of a certiorari *by way of explanation* or otherwise, besides those which are expressly ordered to be certified, are put in without any warrant or authority, and consequently shall be no more regarded by the court above, than if they had been wholly omitted.

11. Certiorari returned by clerk of the peace was held ill, he not being the person to whom the certiorari was directed; but it should have been returned by 2 justices. 2 Salk. 479. pl. 27. Trin. 7 W. 3. B. R. Ashley's case.

(L) Variance and the Effect thereof, and false Returns.

Br. Vari-
ance, pl. 62.
cites S. C.
Br. Certio-
rari, pl. 6.
cites S. C.

1. Certiorari to remove the indictment of *stealing 2 horses*, and the indictment of *one horse only* was certified in chancery, and sent into B. R. and for the variance between the writ and the indictment, *they would not arraign the prisoner*, but he went fine die; for they had no warrant, &c. Br. Corone, pl. 69. cites 3 Aff. 3.

2. In assize the record was removed by certiorari and mittimus before the justices of B. R. and there was a variance between the writ of certiorari, and the record and mittimus; for the one was *H. Grene* justice, scilicet, the record, and the writ was *H. de Grene*, and so surplusage by the word [de], and therefore the justices would not proceed. Br. Variance, pl. 71. cites 28 Aff. 52.

3. A certiorari was to remove a record *cujusdam inquisitionis capi*, &c. in *curia nostra*, &c. but the record being in the time of the former king, the court held the writ ill, and that the record is not well removed. D. 206. b. pl. 12. Mich. 3 & 4 Eliz. Anon.

4. A certiorari was to remove an indictment of *forcible entry*, but the return to it was a *peaceable entry and a forcible detainer*; so that there being no such indictment before them as the certiorari mentions, it was insisted that it was no contempt in the justices not to make any return. But per cur. it is the usual course of the court to make certioraries in this form, and therefore this is no excuse. Sty. 89: Hill. 23 Car. Chambers v. Floyd.

5. Upon a certiorari brought to remove an indictment for *bar-etry* in Middlesex, 2 or 3 lines of the indictment were left out. It was agreed that if this indictment had been certified out of Lon-
don,

don, it might be amended on motion by the original, because by their charter they certify only *tenorem recordi*, so that the record itself still remains with them, and the court may amend by it; but it cannot be amended in any other county, because the law supposes the record itself to be removed, and so there is nothing remaining for them to amend it by. Sid. 155. pl. 5. Mich. 15 Car. 2. B. R. The King v. Alcock.

6. A certiorari was directed to a *justice of Chester*, or his deputy, [357] and it was returned and subscribed by such a one *chief justice*. It Sid. 64. pl. 35. S. C. and the court thought it a good return, was objected that the return was ill, it not being by the same person; and after divers motions the court held it good. Lev. 50. Mich. 15 Car. 2. B. R. Barrow v. Hewitt.

because the direction of the writ implies the superior, inasmuch as it mentions the deputy; and the statute of 8 H. 3. cap. 1. styles him the high justice, and (high) and (chief) are all one, and the court will not intend that there is another justice beside him who made the return; and judgment nisi, &c. — Keb. 165. pl. 120. Mich. 13 Car. 2. B. R. the S. C. adjournatur. — Ibid. 187. pl. 168. S. C. adjudged for the plaintiff. — Ibid. 210. pl. 13. Hill. 13 Car. 2. S. C. but S. P. does not appear.

So where a certiorari was directed to the *justices of Ely*, and was returned by such a one *chief justice of Ely*, the same was adjudged good; Lev. 50. in casu supra, cites it as lately adjudged in the case of *Harrison v. Munford*. — Sid. 64. cites it as the case of *Harrison v. Morthen*, and held good there. — Keb. 187. cites it as the case of *Harrison v. Morpeth*, in C. B. 1654.

* It seems that this, according to Keb. 187. should be 2 & 3 E. 6. cap. 28.

7. A certiorari was to remove an order against T. S. concerning *foreign salt*, which being removed, appeared to be an order touching *salt*, without the word (foreign.) It was held that for this cause it was not removed, there being no such order. 1 Salk. 145. pl. 4. Mich. 8 W. 3. B. R. Anon.

7 Mod. 97. Mich. 1. Ann. B. R. Anon. S. P. and seems to be S. C. notwithstanding.

ing the difference of the year, and held accordingly; for a special certiorari cannot remove general orders, though a general certiorari will remove special ones.

8. When a presentment in a leet is removed by certiorari, the *file of the court must be set out exactly*; but there needs no such nicety in pleading; per Holt Ch. J. 11 Mod. 228. Trin. 9 Ann. B. R. in case of the *Queen v. Jennings*.

(M) Return. What is a Bad Return, and what No Return.

1. **C**ertiorari to remove indictments was returned, that at the *sessions held at C. before T. B. and other justices*, to preserve the peace of the king in the same county, and did not say *ad diversas felon*, &c. according to their commission; and it seems there that the party shall not be arraigned of the felony specified in the indictment in B. R. because it is not well removed for the cause aforesaid; and by some, no record is before justices of the peace, &c. because it is removed. *Quære* thereof; *quære* before whom the record remains, because it is doubted. Br. Indictment, pl. 32. cites 12 H. 7. 25.

2. Cer-

2. Certiorari to the county palatine of Chester. They returned that they had jurisdiction of the cause, and that therefore they are not to certify it. It was objected that this return was too general; for they have not shewed any cause why they should have jurisdiction. Roll Ch. J. ordered them to shew cause why they should not make a better return. Sty. 155. Hill. 1650. Allen's case.

Comb. 262. S. C. Exception was taken that it is only an historical recital. Eyre J. seemed to allow the exception; for every indictment ought to begin, juratores pro domino rege super sacramentum suum præstant, and it is a necessary part thereof; but Holt Ch. J. said it may be either way, and that this is well enough, and tantamount. The reporter adds a quære.

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3. Indictment upon the statute 5 Eliz. for exercising a trade in a borough, not being bound apprentice to it; and upon a certiorari to remove it into B. R. the mayor made this return, viz. *Humillime certifico quod ad sessionem pacis, &c. per juratores presentatum existit quod billa sequens est vera*, viz. *Quod prædict' Berry did exercise, &c.* omitting the clause *juratores pro domino rege presentant quod, &c.* The first exception was, that *billam sequens est vera* is naught; sed non allocatur, as to * that part of the return. 2d Exception was, that there is no bill at all; for it is not said that it was presented by the jury. Sed per curiam, this is no return to the certiorari; for the writ commands to return an indictment, but this is none, therefore they could not quash it; neither would they suffer this return to be filed, because it was insufficient, wherefore the mayor was ordered to amend the return. Et per cur. a return *quod humillime certifico*, is not good. Carth. 223. Pasch. 4 W. & M. in B. R. The King v. Berry.

4. A certiorari issued to remove a conviction for deer-stealing, and the justices returned 2 affidavits, and a warrant to distrain; and this return was quashed as imperfect. 1 Salk. 146. pl. 8. Trin. 12 W. 3. B. R. The King v. Levermore.

5. On a certiorari to remove an order, the return was *cujus quidem tenor sequitur in hæc verba*, and not *qui quidem ordo sequitur in hæc verba*, and it was quashed for that reason. 1 Salk. 147. pl. 10. Pasch. 1 Ann. B. R. The Queen v. St. Mary's Parish in the Devises.

6. Certiorari to remove a conviction for selling cyder without paying the duty on the late statute, and the justice made the return in English; and upon a motion to quash it, it was allowed to be good. 1 Salk. 149. pl. 16. Mich. 2 Ann. B. R. Anon.

(N) Procedendo. In what Cases.

1. Prisoners were removed with their indictments by certiorari into B. R. and all except one were put into the custody of the marshal, and this one was remanded, because appeal was taken against him at N. before the certiorari, to which he pleaded not guilty, and process of distress awarded against the jury, and therefore he was remanded to Newgate, because the appeal shall not be discontinued. Br. Corone, pl. 161. cites 16 E. 4. 5.

2. A cer-

2. A certiorari was granted out of this court to remove certain indictments of forcible entries, whereas in truth there was no indictment of forcible entry found against the party. Upon this a superseas was prayed to supersede the certiorari. Per Roll J. this certiorari was gotten by way of prevention for what might be done; but ordered a procedendo to the justices to proceed, notwithstanding the certiorari. Sty. 127. Trin. 24 Car. B. R. Anon.

3. After certiorari returned and filed, no procedendo can go; per cur. 6 Mod. 43. Mich. 2 Ann. Anon. 2 Hawk. Pl. C. 294. cap. 27.

f. 68. says that it seems so by the common law. And ibid. in Marg. says it was agreed in B. R. Hill. 6 Geo. The King v. Whitlow.

(O) The Effect of a Certiorari. And Proceedings, [359] &c. after.

1. AFTER an indictment upon the stat. 8 H. 6. before the justices of peace in Essex, they awarded restitution; but before it was made there was a certiorari delivered to the custos rotulorum, but he would not open or read it till after restitution was made; and yet the judges seemed clear that the restitution was well awarded and made. And a diversity was taken between an act judicial and ministerial; the act of the justices of peace is injudicial, and their negligence in not sending a superseas shall not prejudice; but where a minister receives a countermand, as if the sheriff be superseded, this is a discharge of the authority which he had before; and if justices of peace receive a certiorari, whatever they do afterwards is without warrant; but all which the sheriff does after, upon the warrant before, is not erroneous; and yet their negligence is punishable by attachment, as a contempt. Mo. 677. pl. 921. cites Hill. 45 Eliz. B. R. Fitzwilliams's case.

Cro. E. 215. pl. 5. S. C. the restitution after the certiorari was held void, because the hands of the justices were thereby closed, it being an express prohibition to them, viz. ulterius terminari coram vobis nolumus, and so every act done by

their authority after its delivery is void.——Yelv. 32. S. C. and re-restitution was granted upon great deliberation, and the custos rotulorum was much checked by the court for a misdemeanor.——Hawk. Pl. C. 154. cap. 64. f. 61. says it is certain that a certiorari from B. R. is a superseas to such restitution; for every such certiorari has these words, coram nobis terminari volumus & non alibi, and consequently it wholly closes the hands of the justices of peace, and avoids any restitution which is executed after the teste; but does not bring the justices of peace, &c. into a contempt, unless they proceed after the delivering thereof.

2. If a certiorari be directed to justices of peace to remove an indictment found before them, they cannot proceed, although the record is not removed. The 21 Jac. 1. cap. 8. does not extend to indictments of felony, but only to lesser acts against the peace, as riots, trespasss, forcible entry, and the like, they may proceed in these cases, notwithstanding such certiorari, if he that sues out such certiorari does not enter into a recognizance with sureties to prosecute it with effect, and to pay costs to him against whom the trespasss was committed, if the defendant does not prevail. Jenk. 181. pl. 64.

A certiorari to the justices, though the day of return is past, is a superseas to the proceeding upon the indictment; for there are express words for

the stay thereof, viz. eo quod rex non vult feloniam illam terminari alibi quam coram seipso, &c. D. 245. a. pl. 63. Mich. 7 & 8 Eliz.——2 Hawk. Pl. C. 293. cap. 27. f. 64. S. P. and says, that

that the proceeding after is erroneous, notwithstanding the party who prosecuted it never shake any other suit to have the record certified, but only by causing the certiorari to be delivered.

2 Hale's Hist. Pl. C. 213. Hancock's case, S. P. resolved, and seems to be S. C.

3. After a certiorari brought and tender of sufficient sureties, according to the statute, all the proceedings of the justices of peace are coram non iudice; resolved. Mar. 27. pl. 63. Trin. 15 Car. Anon.

4. If an indictment is removed by certiorari, and *no bail is put in*, you may proceed below without any procedendo; per Roll Ch. J. Sty. 321. Hill. 1651. B. R. Anon.

5. A certiorari is no superseas if it be *not delivered before the return is expired*. 2 Hawk. Pl. C. 294. cap. 27. f. 64.

Keb. 944. pl. 3. Hill. 17 & 18 Car. 2. B. R. the King v. Rhodes.

6. Whether a *recognizance for the good behaviour be superseded* by a certiorari. See 2 Hawk. Pl. C. cap. 27. f. 65.

7. All *proceedings after a certiorari allowed* are erroneous; per cur. 1 Salk. 148, 149. pl. 13. Hill. 1 Ann. B. R. Crofts v. Smith.

S. P. says it is agreed by all the books.

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S. P. 6

Mod. 33.

Mich.

2 Ann.

B. R. Anon.

8. Certiorari to remove indictments is no *superseas* by 5 & 6 W. & M. cap. 11. unless recognizance be entered into in 20 L. 2 Salk. 564. pl. 3. Pasch. 1 Ann. B. R. the Queen v. Ewer.

1 Salk. 147.

pl. 12.

Mich. 1

Ann. B. R.

the Queen

v. Nath,

S. C. held per cur. accordingly.

9. After a *warrant issued out* upon the act against deer-stealing to *levy by distress*, a certiorari was brought, and the record thereby removed up in B. R. but that could *not hinder the execution*. 6 Mod. 83. Mich. 2 Ann. B. R. in case of Morley v. Staker.

1 Salk. 147.

the Queen

v. Nath,

S. C.

10. If the *warrant was made returnable before the justices of peace*, though the record of conviction be after moved into B. R. by certiorari, yet they may *call the constable to account* upon the warrant; but if the warrant was not made returnable, the officer is not bound to return it. 6 Mod. 83. Mich. 2 Ann. B. R. in case of Morley v. Staker.

1 Salk. 147.

the Queen

v. Nath,

S. C.

11. If before certiorari *execution be done in part*, notwithstanding the certiorari the officer may go on with it. 6 Mod. 83. Mich. 2 Ann. B. R. in case of Morley v. Staker.

2 Hawk.

Pl. C. 295.

cap. 27.

f. 74. says,

that the per-

son to whom

a certiorari

is directed

may make

what return

to it he

pleases, and

the court

will not stop

the filing of

12. On certiorari to remove *all inquisitions of forcible entries made upon J. S.* the justices *returned an inquisition of an entry made by B. upon J. S.* and now *affidavits were offered* to give the court satisfaction, *that the only inquisition before the justices was an inquisition of a force by A. and that the precept was to summon a jury to inquire of a force against J. S. by A. and there they inquired of no other force.* The court would hear no affidavits against the return (which is matter of record) in order to make restitution, but we may in order to have an information filed against the justice for this abuse. 6 Mod. 90. Hill. 2 Ann. B. R. Cowper's case.

on affidavits of its falsity, except only where the public good requires it, (as in case of the

the commissioners of sewers) or for some other special reason; but regularly the only remedy against such a false return, is an action on the case at the suit of the party injured by it, and an information, &c. at the suit of the king.

13. If the party that removes *indictment*, does not enter into *recognizance* to try it next assizes, or term, or the sitting within the term, the certiorari is no superseas; and *failure of trying* is a *forfeiture* of recognizance, after which they will not hear a motion in arrest of judgment. 6 Mod. 43. Mich. 2 Ann. B. R.

14. The court made it a rule, that the defendant shall never *carry to trial* an indictment removed in B. R. by the prosecutor, without leave of the court. 6 Mod. 245. Mich. 3 Ann. B. R. in case of the Queen v. Sir Jacob Banks.

2 Salk. 653.
pl. 32. S. C.
and same
rule.

15. An order was made against A. and the certiorari was to *remove all orders against A. and B.* The court held, that this *shall not remove the order against A. alone*, but it ought to be to remove all orders against A. and B. or either of them. 1 Salk. 151. pl. 21. Mich. 4 Ann. B. R. The Queen v. Barnes.

2 Ld.
Raym.
Rep. 1199.
the Queen
v. Baines,
S. C. and
the certiorari
was quashed,
because in-
sufficient.

16. If there be a *forcible detainer*, and an inquisition taken, and then a *certiorari to remove the inquisition*, and then there is a *new forcible detainer*, the justices may, notwithstanding the certiorari, record the force; but they cannot proceed to award restitution; so if after the inquisition, and before the certiorari, there had been a forcible detainer, the justices might have recorded the force, but all proceedings upon such inquisition are stopped. 1 Salk. 151. pl. 22. Pasch. 5 Ann. B. R. Kneller's case.

17. A *conviction* was upon view of 3 justices of a *forcible detainer*; if a certiorari comes to them, yet they may *proceed to set a fine and compleat their judgment*, and it will be no contempt; but the justices having committed the defendants to gaol to lie there till they should pay a fine to the king, and no fine being set, the conviction was held naught and quashed, and defendants discharged. 2 Ld. Raym. Rep. 1514. Hill. 1 Geo. 2. The King v. Elwell & al^s.

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(P) Costs. In what Cases.

1. 5 & 6 W. & M. IF the defendant procuring such certiorari be cap. 11. convicted, B. R. shall give reasonable costs to the prosecutor, if he be the party injured, or if he be a justice of peace, mayor, constable, or other civil officer, who prosecuted upon any fact committed that concerned him, or them, as officers to prosecute or present.

2. And costs shall be taxed according to the course of the said court, and the prosecutor, for recovery of the said costs, shall within 10 days after demand and refusal of the payment of them upon oath, have an attachment granted against the defendant by the said court for his contempt; and the recognizance shall not be discharged till such costs are paid.

2 Hawk.
Pl. C. 292.
cap. 27.
f. 56. S. P

3. No more *costs* shall be *taxed* upon a certiorari, than the prosecutor has been at *since the certiorari*, and upon it; and the master is not to consider the costs below. 1 Salk. 55. pl. 5. Pasch. 1 Ann. B. R. The Queen v. Summers.

4. In scire facias upon a recognizance removed by certiorari, and upon oyer entered in *hæc verba*, the condition of the recognizance recited in the scire facias was, that the defendant should give notice of trial, *prosecutori et ejus clerico*, whereas the recognizance itself was *prosecutori aut ejus clerico*; and per curiam, this is a variance and quite different; so the defendant had judgment. 3 Salk. 369. pl. 7. Pasch. 1 Ann. B. R. The Queen v. Ewer.

5. If an indictment be removed by certiorari from the sessions into B. R. and the defendant is convicted, the prosecutor is intitled to his costs by the statute. Arg. 10 Mod. 193. Mich. 12 Ann. B. R.

(Q) Of the Proceedings of the Superior or Inferior Court after Certiorari issued.

10

Br. Present-
ment, pl.
10. cites
S. C.

1. Presentments in courts may be removed into chancery, and be sent thence into B. R. and the process shall be made to amend the nuisance, or to repair the bridge, &c. quod nota, and this it seems by certiorari and mittimus. Br. Certiorari, pl. 7. cites 38 Aff. 15.

Sed per cur.
Trin. 4
Ann. B. R.
we will file
them in any
cause where
no apparent

2. Where orders of commissioners of sewers are removed into B. R. by certiorari, the court does not file them, but hear counsel upon the matter of them before filing; for if they are good, the court must grant a procedendo, which they cannot do after they are filed. 1 Salk. 145. pl. 6. Hill. 11 W. 3. B. R. Anon.

danger is likely to ensue by the delay. Cited 1 Salk. 145. in pl. 6. — There is a rule in the court of B. R. that no order of commissioners of sewers ought to be filed without notice given to the parties concerned. Also it is every day's practice of that court, before it will suffer the return of a certiorari for the removal of the orders of such commissioners to be filed, to hear affidavits concerning the facts whereon they are grounded; and if the matter shall still appear doubtful, to direct the trial of feigned issues, and either to file the return, or supercede the certiorari, and grant a procedendo as shall appear to be most reasonable for the trial of such issues, and to give costs against the prosecutor of the certiorari, if it appear to have been groundless. 2 Hawk. Pl. C. 288. cap. 27. f. 34.

[362] 3. If certiorari goes to remove a record, the judge below is not in contempt for proceeding on the record till service of the writ; but all proceedings upon it after the certiorari tested are void; per cur. 12 Mod. 384. Pasch. 12 W. 3. Anon.

4. It was moved for an attachment against an officer for executing by distress an order of justices, for levying of money for repair of a bridge, after the order was removed by certiorari; per Holt Ch. J. there never is any formal allowance of a certiorari below; but to bring one in contempt, the distress must be after the certiorari presented below; and if a warrant were delivered before that time, the way had been upon producing the certiorari,

to get a *superfedeas* of it; and deliver it to the officer, or else he cannot be in contempt. 12 Mod. 499. Pasch. 13 W. 3. Anon.

5. Per Holt Ch. J. it should be a rule for the future; that on moving *indictments* here by certiorari, we should not hear *motion in arrest* of judgment till *defendant's appearance*. 7 Mod. 39. Trin. 1 Ann. B. R. Anon.

6. When one removes an *indictment* by certiorari, he *ought to appear above* the term it comes in, or else he forfeits his recognizance that he enters into for trying it; but such appearance need not be in person, but *by his clerk*, and without it he cannot have a copy of the indictment to quash it. 6 Mod. 220. Mich. 3 Ann. B. R. Anon.

7. The defendant was *indicted at the sessions for a nuisance, and pleaded not guilty*; and *after issue joined, he obtained a certiorari to remove the indictment* into this court, and then demurred to it; and now the prosecutor moved for a rule, that the clerk of the peace might return the defendant's plea in the court below, in order to hinder his pleading *de novo*; on the contrary was cited Carth. 6. THE KING v. BAKER, that in such case the party is always admitted to waive the issue below, and go to trial upon issue joined in this court. The court inclined that the defendant should abide by his former plea; but it being a matter of practice, it was referred to the clerk of the crown, who after reported, that upon certioraries to remove indictments, the *practice is not to return the plea below, unless a verdict had been given*. Mich. 11 Geo. 2. The King v. Carpenter.

(R) Bills in Chancery and Proceedings thereon.

1. RICH was plaintiff upon a certiorari bill to *remove a cause out of the mayor's court, his witnesses being out of that jurisdiction*, and the bill here was for an account touching other matters. Witnesses being examined, the defendant moved for a procedendo, and insisted upon it; for that if the cause should be heard here, he could not be relieved, not having any bill here, he being here but defendant, though plaintiff in the mayor's court. The plaintiff's counsel insisted that no procedendo ought to be; for that *this bill containing other matters* could not be determined upon the bill in the mayor's court, and that the bill could not be divided; and that the plaintiff in the mayor's court might file his bill in the mayor's court, in this court, and direct it to the chancellor, and have the same remedy here as he could there. Ordered that the cause stand to be heard on the bill in this court; and after hearing, the cause was dismissed out of this court. Chan. Cases, 31. Mich. 15 Car. 2. Rich v. Jaquis.

2 Freem.
Rep. 174
pl. 232.
S. C.

2. Plaintiff brought a certiorari bill; the defendant *pleaded a decree in the mayor's court, and an inrolement*, which was said to be only pronouncial; and it was referred to a master to certify whether

Certiorari.

ther it was *before the bill*. 3 Chan. Rep. 66. 24 July, 1671. Cook. v. Delabere.

3. A certiorari was not allowed to remove proceedings by English bill in the lord mayor's court into chancery, and so a demurrer held good, and a procedendo ordered, &c. 2 Chan. Rep. 108. 27 Car. 2. Sowton v. Cutler.

4. A bill was brought in the lord mayor's court, upon an agreement to take a lease of a house in Milk-street Market. The defendant there answered, that he was only a trustee for Allen, who promised to indemnify him; and in the name of the said Allen he brought a certiorari bill, but a procedendo was decreed. Fin. Rep. 224. Trin. 27 Car. 2. Doegood v. Allen.

5. A certiorari bill may be brought to remove a cause out of a court of equity in a county palatine into chancery; by Ld. Keeper. Vern. 178. pl. 170. Trin. 1683. Portington v. Tarbock.

6. Two plaintiffs here sue for lands in the county palatine of Durham. One of them lives in Middlesex, and the other is an old infirm man, and not able to follow the suit; therefore a certiorari was granted to the chancellor of Durham, to certify the proceedings depending before him into this court. Curs. Canc. 454. cites Chan. Rep. 62. [But it is miscited.]

7. If on a certiorari bill the cause is brought on to hearing, the court, if they think fit, may make a decree, or send it back to the mayor's court to be determined there; and sometimes the court sends it back after publication passed, and a subpoena served to hear judgment, and before the hearing. 2 Vern. 491. pl. 443. Hill. 1704. Stephenson v. Houlditch & al'.

For more of Certiorari in general, see *Writ, Habeas Corpus, Record, Sewer, Superlodeas*, and other proper titles.

Cessavit.

(A) By Statute. And of one where it shall be of another.

For the exposition of these statutes, see the several divisions under this head.

1. 6 E. 1. cap. 4. *If a man lets his land to farm, or to find effluers in meat or in cloth, amounting to the 4th part of the very value of the land; and he, which holdeth the land so charged, letteth it lie fresh, so that the party can find no distress there by the space of 2 or 3 years to compel the farmer to render, or to do as it containeth in the writing or lease. 2dly, It is established that, the 2 years being past, the lessor shall have an action to demand the land in demean by a writ, which he shall have out of the chancery. 3dly, And if he against whom the land is demanded, come before judgment and*

and pay the arrearages and the damages, and find surety (such as the court shall think sufficient) to pay from henceforth, as it containeth in the writing of his lease, he shall keep the land. *4thly, And if he tarry until it be recovered by judgment, he shall be barred for ever.

2. *Westm. 2. 13 E. 1. cap. 21.* Whereas in a statute made at Gloucester, cap. 4. it is contained, that if any lease his lands to another to pay the value of the 4th part of the land, or more, the lessor or his heir, after the payment hath ceased by 2 years, shall have an action to demand the land so leased in demean. 2dly, In like manner is agreed, that if any withhold from his lord his due and accustomed service by 2 years, the lord shall have an action to demand the land in demean by such a writ. 3dly, *Precipe A. quod iuste, &c. reddat B. tale tenementum quod A. de eo tenuit per tale servitium, & quod ad prædictum B. reverti debet eo quod prædictus A. in faciendo prædictum servitium per biennium cessavit, ut dicitur.* 2. And not only in this case, but also in the case whereof mention is made in the said statute of Gloucester, writs of entry shall be made for the heir of the demandant against the heir of the tenant, and against them to whom such land shall be aliened.

3. If there be lord, mesne, and tenant, and the tenant ceases for 2 years, the lord shall have a cessavit against the tenant paravail, supposing that the mesne in doing his services per biennium jam cessavit; for the cesser of the tenant is a cesser as to all the mesnes; per Fitzherbert and diverse serjeants, and several e contra; and it seems that it cannot be law; for then the act of the tenant shall prejudice the mesne of his mesnalty. *Br. Cessavit, pl. 1. cites 27 H. 8. 28.*

4. If an abbot loses by cessavit, this shall bind his successor. *Br. Cessavit, pl. 34. cites Doct. & Stud. lib. 2. fol. 8.*

5. The same law seems to be of a bishop, and parson of a church. *Ibid.*

6. But if baron and feme, seised in jure uxoris, lose by cessavit, it shall bind the feme. *Ibid.*

(B) Lies of what.

1. IF lands held lie in several counties, the lord may distrain; but assise nor cessavit does not lie; per Hill J. *Br. Cessavit, pl. 21. cites 18 Aff. 1.* *Kelw. 105. pl. 18. contra.*

2. Cessavit lies of an *advowson; for this lies in tenure, and so it is adjudged about 22 E. 3. per Vavisor & Davers. But it does not lie in tenure; per Townshend & Brian. *Br. Cessavit, pl. 22. cites 5 H. 7. 37.* *Br. Quare Impedit, pl. 30. cites [43] 42 E. 3. 15. that cessavit lies*

of advowson; but Brooke says, quare ipse; for it seems that præcipe quod reddat does not lie of it, but writ of right, darren presentment, or qua. impedit. — 2 Inst. 297. says it is holden that a cessavit does lie of an advowson, and yet it is not in demesne; and overt, and sufficient to his distress, cannot be pleaded.

• *Br. Cessavit, pl. 6. cites 43 E. 3. 15. S. P.*

3. Cessavit, that the tenant held of the plaintiff by homage, fealty, suit of court and rent, and that in doing the services aforesaid per biennium

There must be a tenure between the

feoffor and the feoffee in fee-simple; for a cessavit lies not upon a reservation without such a tenure. 2 Inst. 296. and says it was so adjudged in 21 E. 2.

* [365]

2 Inst. 296.
S. P.

biennium jam cessavit, and so the writ and the count is in doing services, and yet cessavit does not lie of homage nor of fealty, but of things annual, viz. of rent, and of suit of court, well; per tot. cur. quod nota. And the defendant said that he held by fealty and the rent only, absque hoc that he held by homage, fealty, suit of court, and the rent modo & forma; and as to this rent, the laud was always open to his distress. And per Prisot, if the lord has no court the tenant may allege it; and per Littleton, he cannot traverse the tenure by homage in this action; for cessavit does not lie of homage. But per Prisot clearly, he may traverse the homage as above; for if he takes it only by protestation, and the plea is found against him, the protestation shall not serve. Br. Cessavit, pl. 2. cites 33 H. 6. 44, 45.

4. Cessavit does not lie of homage and fealty; for those are not annual, and yet the count is that he holds by homage, fealty, 10 s. rent, and suit of court, and that in doing the services aforesaid per biennium jam cessavit; for there is no other form; but the cesser shall be intended of the rent and suit which are annual, and not of homage and fealty. Br. Cessavit, pl. 23. cites 6 H. 7. 7.

5. Cessavit lies of suit of court. Br. Cessavit, pl. 35. cites F. N. B. 209.

(C) For whom it lies.

1. **TENANT** in dower, or for life, of a *seignory*, shall have cessavit if the tenant ceases, &c. Br. Cessavit, pl. 29. cites 32 E. 1. and 43 E. 3. 15.

2 Inst. 402.
S. P. and
cites Cessavit
42. S. C.—
F. N. B. 209.
(F) S. P. and
cites S. C.

2. If two *coparceners* are lords, and the tenant ceases, and the one coparcener dies, the other shall not have cessavit; for it was given to him and to another who is dead; and hence it appears, that the heir shall not have cessavit of cesser in the time of his ancestors. Br. Cessavit, pl. 29. cites 33 E. 3.

by Wilby.——8 Rep. 118. a. cites S. C. and Pl. C. 110. a. and says the reason is, that the tenant before judgment may render the arrears and damages, &c. and retain his land, which he cannot do when the heir brings cessavit for the cesser in his ancestor's time; for the arrears, which incurred then, do not belong to the heir, and this being against common right and reason, the common law adjudges the act of parliament void as to this point.

Br. Cessavit,
pl. 32. cites
S. C.—
2 Inst. 402.
cites S. C.
& S. P.—
F. N. B. 209. (F) S. P.

3. But it seems, that where two jointenants are lords, and the tenant ceases, and one dies, the other shall have cessavit; for there the whole is in the survivor by the first feoffor, and not by him who died. Br. Cessavit, pl. 29. cites 33 E. 3.

A cessavit
lies not a-
gainst tenant
in tail, or
tenant for
life, unless
the remain-
der be limit-

4. Cessavit was brought against tenant for life, the remainder over in tail, the reversion to the demandant, and therefore by the best opinion the action does not lie; for it is said there, that none shall have cessavit if he has not fee in the seignory, and that he may recover the fee-simple of the tenancy; and notwithstanding that this gift was made to hold of the chief lord, yet cessavit does not lie

lie where the fee remains in the demandant. Br. Cessavit, pl. 9 cites 45 E. 3. 27.

ed over to another in fee so as he

is tenant to the lord as tenant by the curtesy is. 2 Inst. 295. and S. C. cited in the marg. — But where the gift is made for term of life, the remainder over in fee, the cessavit lies; for there the lord shall be compelled to change avowry; contra where the donor has the reversion. Br. Cessavit, pl. 9. cites 45 E. 3. 27.

5. Note, it is a good plea in cessavit, that the father of the demandant gave the land to him in tail; judgment si actio; for cessavit does not lie for the donor or his heir against the donee, nor his issue. Br. Cessavit, pl. 3. cites 33 H. 6. 53.

6. But the lord may have cessavit in the degrees against the tenant [366] in tail, or his issue, of a cesser before the gift, as it seems there. Ibid.

7. He who has a feignory for term of years, shall not have cessavit; but he who has a feignory for term of life may have cessavit; the diversity is, inasmuch as it is præcipe quod reddat, which the termor cannot have. Br. Cessavit, pl. 40. cites 9 H. 7. 16.

S. P. as to estate for life, or in tail; but he in reversion shall not

have cessavit against the donee in tail, or tenant for life; for he in reversion is not dominus within this statute. 2 Inst. 401.

8. So of tenant by the curtesy. Br. Cessavit, pl. 29. cites Fitzh. Cessavit 59. 42.

9. If baron and feme are intitled to cessavit in jure uxoris, and the baron dies, the feme shall have the cessavit. Br. Cessavit, pl. 33.

10. Donor in tail shall not have cessavit. Br. Cessavit, pl. 35. cites F. N. B. 209.

But where a man gives in tail, the re-

mainder over in fee, the chief lord of whom the donor held shall have cessavit if the tertenant ceases. Ibid.

In cessavit brought by the donor against the donee in tail the writ was abated. Thel. Dig. 173. lib.

11. cap. 53. f. 10. cites Trin. 19 E. 3. Cessavit 30. and that so agrees Mich. 28 E. 3. 95. and Mich. 33 H. 6. 53. but says, the writ of cessavit lies well for the lord paramount against the tenant in tail, the remainder over, and says see the same books.

11. If there be lord, mesne, and tenant, and the tenant paravalle ceases by two years, the lord shall have cessavit against the tenant, and suppose that the mesne ceased, 2 Inst. 402.

12. If the tenant ceases by one year, and the lord grants over his feignory, and then the tenant ceases another year, neither of them is dominus within this act. 2 Inst. 401. cites 2 Rep. 93. [a. Trin. 43 Eliz. in] Bingham's case.

3 Bulst. 253. cites S. C. 92. & 93. 4. where it is said, that

where two accidents are requisite, and the one happens in the time of one, and the other in the time of another, in such a case neither the one nor the other shall take benefit of this, because that both did not fall in the time of any of them, and both are requisite to the consummation of the thing. — Doderidge denied the case of cessavit in Bingham's Case. 2 Rep. Palm. 417. Pasch. 1 Car. B. R.

(D) Against whom it lies.

1. THE lessor shall not have cessavit against his lessee for life. Thel. Dig. 173. lib. 11. cap. 53. f. 12. cites Mich. 11 E. 3. Cessavit 51.

2. And it does not lie against tenant in dower the reversion to a stranger. Thel. Dig. 173. lib. 11. cap. 53. f. 12. cites Mich. 13 E. 2. Cessavit 51.

3. Nor against tenant for life, the reversion to a stranger. Thel. Dig. 173. lib. 11. cap. 53. f. 12. cites Trin. 8 E. 3. 407.

4. If the tenant infeoffs one who ceases, or is disseised by one who ceases, in those cases cessavit lies well against the feoffee or disseisor, without other privy, or without other seisin than the seisin which was had by the hands of the feoffor or disseisee. Br. Cessavit, pl. 36. cites 19 E. 3. and Fitzh. Brief 249.

5. Cessavit will lie against tenant of the franktenement. Br. Cessavit, pl. 28. cites 29 E. 3. and Fitzh. Cessavit 43.

[367] 6. Cessavit against three who made default, and at the grand cape tendered their law to be waged of non-summons, and at the day two made default, and the third came and said that he was tenant of the whole, and tendered the arrearages, & non allocatur; for they waged their law in common before, and there he cannot say that the others had nothing, and also he cannot tender the arrears for all; for as well as the other two may alien their parts, they may forfeit their parts. Br. Cessavit, pl. 4. cites 40 E. 3. 40.

7. And after he said that J. was seised, and infeoffed the three, and to the heirs of him, by which he prayed to be received for two parts, and was received, and found surety of two parts only; for of the third he may lose; for he is party, therefore of this he shall not find surety. Quod nota. Ibid.

8. It was said that cessavit lies against tenant for term of life, the remainder over in fee, &c. Nota bene. Br. Cessavit, pl. 20. cites 14 H. 6. 25. at the end.

(E) Brought how. And Abatement of Writ and Count.

1. CESSAVIT against A. and B. by several precipes, and after the writ was that *prædicti A. and B. tenent de eo per certa servitia & quæ ad ipsum revertere debent eo quod prædicti A. & B. &c. cessaverunt*, &c. and held good, notwithstanding that they joined in tenure and in the cesser. Thel. Dig. 107. lib. 10. cap. 16. f. 2. cites Mich. 20 E. 2. Brief 826. Cessavit 48.

2. In cessavit against two by several precipes, that both held of him per certa servicia, & quod cessaverunt in common, and yet held good. Thel. Dig. 113. lib. 10. cap. 23. f. 3. cites Mich. 20 E. 2. Brief 826. Mich. 3 E. 3. 100. and says see 30 E. 3. 32. in scire facias accordingly.

Thel. Dig.
83. lib. 9.
cap. 5. f. 15.
cites S. C.

3. A man counted that the manor of D. was held of him, and that J. N. had entered into part, and that the tenant had ceased, where he has alleged the whole manor to be held, and that the tenant having part of the manor had ceased in that part, and yet the writ good; and so it seems that the services shall be apportioned

tioned upon disseisin. Br. Cessavit, pl. 27. cites 8 E. 3. and Vet. Nat. Brev. tit. Cessavit.

4. In cessavit a man shall not put title in the writ, as which he claims esse jus, &c. Thel. Dig. 106. lib. 10. cap. 14. f. 10. cites Hill. 10 E. 3. Brief 690. inasmuch as it is given by the statute.

5. In cessavit the writ was *quod reddat terram quam Jo. de S. uē eo tenuit per servitia*, &c. and which to him *reverti debet eo quod prad' tenens cessavit*, &c. and yet adjudged good, without making any privy, between Jo. de S. and the tenant. Thel. Dig. 105. lib. 10. cap. 13. f. 2. cites Mich. 11 E. 3. Brief 477. and that so agrees Mich. 19 E. 3. Brief 249.

6. In cessavit the writ was in *which he had not entry unless by B. who held it of the ancestor of the demandant*, &c. and *supposed the cesser in the now tenant of the land*, without supposing the now tenant to be tenant to the demandant, and yet adjudged a good writ. Thel. Dig. 105. lib. 10. cap. 13. f. 3. cites Hill. 14 E. 3. Br. 269. and that so it is adjudged Hill. 48 E. 3. 4. and that the cesser is well supposed in the present tenant of the land; and cites Pasch. 39 E. 3. 17.

7. In cessavit of land, if the demandant distrains for fealty pending the writ, his writ shall abate. Thel. Dig. 188. lib. 12. cap. 23. f. 2. cites Trin. 20 E. 3. Cessavit 33.

8. If a man brings cessavit against N. who aliens to S. pending the writ, and the demandant takes the rent and homage of S. and after recovers against N. there S. shall avoid the recovery; for by the acceptance of the rent and homage the writ is abated, and the action extinct; per Stone. Quære. Br. Cessavit, pl. 15. cites 21 E. 3. 18.

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9. And if he receives rent or homage pending his writ, it shall abate. Thel. Dig. 188. lib. 12. cap. 23. f. 2. cites 21 E. 3. 23. 21 Aff. 6.

10. Cessavit against B. supposing that C. held the tenements of the demandant, and that B. by two years had ceased; Grene said, you should have the writ in the per, and Wilby said, he shall have it so, where the cesser was before the entry, and not otherwise. And where a man disseises my tenant I shall have cessavit of the cesser after the disseisin. And it seems by the case, that where the tenant ceases and makes feoffment, the cessavit shall be in the per; contra where the feoffee ceases, there shall be no degrees; so against disseisor; but where the cessavit is of the cesser of the disseisee before the disseisin, the writ shall be in the post; per Stouf. And that if the very tenant leases for life or in tail, [and the lessee] ceases by two years, he shall have no writ but as above, without making mention of any degrees. And so the first writ awarded good, and therefore it seems that it was of cesser after the alienation. Br. Cessavit, pl. 17. cites 21 E. 3. 44.

Ibid. says, see such matters M. 11 E. 3. and H. and M. 14 E. 3. and P. 16 E. 3. and M. 19 E. 3. and 48 E. 3.— Ibid. Brooke says quære of the cessavit against tenant for life, or in tail, where he is not his tenant, but he in reversion; but

where the remainder is over in fee it lies well. — Where there are lord and tenant, and the tenant leases for life, the remainder in tail, saving the reversion to the tenant, in such case the lord shall not have cessavit against the lessee for life; but otherwise it is if the remainder be in fee. Thel. Dig. 172. lib. 31. cap. 53. f. 5. cites Trin. 45 E. 3. 27.

11. Cessavit against *A.* and counted that *B.* held of him, and ceased, and the writ good, without alleging any entry; quære of this; for the cessavit shall lie against the tenant of the franktenement; and therefore it seems that he shall allege no cesser but the cesser of him who is tenant of the franktenement, and holds of him. Br. Cessavit, pl. 28. cites 29 E. 3. and Fitzh. Cessavit 43.

12. In cessavit against an abbot *de uno mess' quod ro. dimisit Richardo quondam abb' predecessori, &c.* which to the demandant reverti debet eo quod predictus abbas in faciendo, &c. cessavit, &c. the cesser shall be intended in the abbot against whom the writ is brought. Thel. Dig. 99. lib. 10. cap. 9. f. 8. cites Pasch. 32 E. 3. Brief 291.

13. Cessavit in *quam non habet ingressum unless by J. N. who demised it to him, and who held it of him by certain services, and which to the aforesaid B. ought to revert per formam, &c.* because the tenant had ceased, and alleged seisin in the count by the hands of *J. N.* the feoffor, and no seisin by the hands of the tenant, and yet the writ good. Br. Cessavit, pl. 19. cites 39 E. 3. 14.

Thel. Dig. 205. lib. 10. cap. 13. f. 4. cites S. C. and says, this is by the stat. of Westm. 2. cap. 43.

Thel. Dig. 273. lib. 11. cap. 54. f. 8. cites Mich. 24 E. 2. Brief 825. and that so agrees Hill. 24 E. 3. Brief 269. notwithstanding that the entry is supposed before the cesser.

48 E. 3. 4. — And where a man by deed gives manor and advowson, or house and shop, by express words, where the advowson is appendant, or the shop is parcel of the house, yet it is no chattel after to say that the one was appendant and the other parcel; by Finch. by which the writ was awarded good. Br. Cessavit, pl. 10. cites 48 E. 3. 4.

Wherefore he said, that where the demandant supposes the tenements to be held by homage, fealty, and suit of court, and so his predecessor gave to hold by so. for all services, and as to this open to his distress, and the best opinion there was, that the demandant ought to maintain the tenure, and not to take issue upon the being open to distress; for where the one alleges tenure of so. and the other that of a d. it may be open to the one, and not to the other Ibid.

* [369]

16. Agreed that a man may plead to the count as to parcel, and in bar for the rest, and there the count shall not abate but for the parcel; quod nota. Br. Cessavit, pl. 10. cites 48 E. 3. 4.

17. In cessavit the writ shall abate for parcel for default in the count as to this parcel, and stand for the rest. Thel. Dig. 236. lib. 16. cap. 10. f. 25. cites 48 E. 3. 5.

18. The

18. The lord *shall not allege esplees* in cessavit or escheat, for *those are ratione domini*, and by seisin therein, and not by seisin in the land. Br. Cessavit, pl. 31. cites 21 H. 6. 22.

19. Cessavit does not lie of *homage and fealty*, for they are not annual, and yet the count is, *that he holds by homage, fealty, 10 s. rent, and suit of court, and that in doing the services aforesaid per biennium jam cessavit*; for there is no other form; but the cesser *shall be intended of the rent and suit which are annual*, and not of homage and fealty. Br. Cessavit, pl. 23. cites 6 H. 7. 7.

20. In cessavit, if the tenant says that he held of the plaintiff by several tenures, and not by one entire payment, this goes to the writ, and not to the action; per cur. Br. Cessavit, pl. 42. cites 10 H. 7. 24.

In cessavit, supposing the tenements to be held by one intire tenan-

cy, if the tenant says, that he holds parcel by certain services, and other parcel by others, and shews the deeds of him whose estate the demandant has in the feignory, the demandant may maintain his writ, notwithstanding those deeds. Thel. Dig. 227. lib. 16. cap. 7. f. 26. cites Mich. 14 E. 3. Cessavit 28.

21. The *stat. W. 2. 13 E. 1. cap. 21. extends not to rent-service created upon a fee-farm, but cessavit upon a fee-farm must be conceived upon the statute of Gloucester*, for which purpose there are several writs in the Register. 2 Inst. 401.

(F) Plea.

1. **I**N cessavit of a toft, the tenant pleaded to the writ, that *this land which is called toft is the site of a mill, and an * estange secke, &c. & non allocatur*; but he was received after to say, that he had nothing unless in right of his feme not named, &c. Thel. Dig. 90. lib. 10. cap. 1. f. 24. cites Trin. 14 E. 3. Brief 277.

* Or a pool let dry.

2. In cessavit the tenant said, that he *had nothing but for term of life, the remainder to another in tail, the remainder to the lessor, &c. judgment of the writ, yet the writ was held good enough and maintainable*. Thel. Dig. 173. lib. 11. cap. 53. f. 11. cites 28 E. 3. 96.

3. In cessavit the tenant, where it is of his *own cesser*, shall not have the view, by which he said, that *as to all but one toft not held of him, and to the toft open to his distress, prist*; Tirwit said, you should say, *open to his sufficient distress*; but per cur. open to his distress, is taken open to sufficient distress, and so to issue. Br. Cessavit, pl. 12. cites 2 H. 4. 5.

† S. P. Br. Cessavit, pl. 18. cites 4 H. 6. 29. But contra if it be of another's cesser.

4. In cessavit the demandant counted that the tenant held of him *a house and 20 acres of land by homage, fealty, and 20 s. rent, &c. The tenant said as to one acre, parcel of the land in demand, he held it of the demandant by fealty and 1 d. for all services; and that he held 2 other acres, parcel of the premises, by fealty and a half-penny for all services; and that he held 3 acres, parcel of the premises, by fealty and one half-penny for all services; absque hoc that he held, &c. by one intire service and to the rest he did not hold of him, and admitted for a good plea*. Br. Cessavit, pl. 18. cites 4 H. 6. 29.

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In this writ the tenure between the demandant and the tenant is tra-

verfable, because this writ is grounded upon the tenure by force of this act; but in this writ the seisin is not traversable, because it is not grounded upon the seisin, neither is the quantity of the services traversable, but to be taken by protestation; for whether he holds by more or less, the cessavit lies. But in an advowry the seisin is traversable, for that it is grounded as well upon the seisin as the tenure. Also in the cessavit the land is to be recovered, and not the services; and it is in its nature a writ, and the jury shall measure in their consciences the quantity of the service. 2 Inst. 296.

5. It was said for law, that in cessavit the *seisin is not traversable, but the tenure or the cesser*; and yet per Danby, it will be hard to have cessavit without seisin within time of memory. Br. Cessavit, pl. 41. cites 5 E. 4. 62.

6. In cessavit it is no plea *that the land is sufficient* to his distress, but shall say *open and sufficient* to his distress; for if it be inclosed, this is cause to have assise. Br. Cessavit, pl. 24. cites 10 E. 4. 1, 2.

Hors de son
fee is not a
good plea in
cessavit, because the tenure is traversable. 2 Inst. 296.

7. And, *as to part*, the defendant said that it is *out of the fee of the plaintiff*, &c. non allocatur. Ibid.

8. And it was brought *against baron and feme*, and counted of 7 acres held by 8 d. and the baron and feme pleaded to issue, and the baron at the day made default, and petit cape awarded, and at the day the baron made default, and the feme was received, and said that *as to one acre she held by fealty and 2 d. which was open and sufficient to his distress*, and to another acre she pleaded in the same manner, and to the rest she said that she held of him as above, *absque hoc* that she held the 7 acres of the plaintiff modo &c. forma, prout, &c. and so see that she pleaded immediately upon her receipt. Ibid.

Br. Brief,
pl. 393.
cites S. C.

9. Cessavit of a house and 22 acres of land, and alleged certain services, &c. The tenant said that he was not tenant of the moiety the day of the writ purchased, nor at any time after had he any thing in this moiety, but J. B. was entire tenant; judgment of the writ; and per Littleton and Catesby, this is a good plea *without answering to the rest*, because the services are intire; for he alone cannot defend the tenancy for the intire services, nor tender the arrears without his companion. Br. Cessavit, pl. 26. cites 21 E. 4. 25.

10. In cessavit the writ was, that in his *homage nor fealty, rent and suit of court*, and in doing the services he ceased, &c. and yet it does not lie of *homage nor fealty*, and yet good, because *there is no other form of writ*. Br. General Brief, pl. 13. cites 7 H. 7. 2.

11. If the demandant in the cessavit be *outlawed in a personal action*, this outlawry may be pleaded in bar of the action, because the arrears are due to the King. 2 Inst. 298.

(G) Judgment. And of the Tender of Arrears, and finding Surety for the Arrears.

1. **I**N a cessavit after the inquest joined, the tenant made default, and at the return of the petit cape the tenant appeared, and offered to pay the arrearages with damages, and to find such surety as the court would award, which was received, because he came before judgment, and found surety, viz. 3 pledges, which bound their lands to the distress of the lord in the same form as the tenant's land is bound. 2 Inst. 297. cites Trin. 9 E. 2. 65.

2. Dean and chapter brought cessavit. The tenant said that he did not hold of them, and it was found against him by verdict at nisi prius, and at the day in bank the tenant came and tendered the arrears, and found surety, &c. that he should cease no more; and the court would not award, that if he at another time ceased, the land should be liable to the rest by reason of the mortmain; but he had other land in the same vill, by which Shard. awarded that he hold his land in peace, and that if the rent be any more arrear, that the dean and chapter shall distrain in all his other lands in the same vill; and that when he shall again cease by 2 years, he shall be bound to pay to the dean and chapter 40 s. and that he have execution by fieri facias or elegit, and the pain was entered in the roll; and it was said there, that the statute does not mention that a man shall tender the damages with the arrears; but by the reporter it has been used that he tender damages and arrears. But M. 17 E. 3. 57. they would not suffer other land to be made liable to the distress of a prior in cessavit, by reason of the mortmain; and after the court awarded damages of one mark. And so see that the tender of arrears before judgment above suffices, though it be after verdict. Quod nota. Br. Cessavit, pl. 16. cites 21 E. 3. 23.

3. In cessavit the tenant pleaded that he did not hold of him, and when the inquest came, and before verdict, the tenant confessed to hold of him, and tendered the arrears of 4 years; and the demandant said that he was arrear by 12 years, and the court took inquest to inquire how long time he was arrear, and the inquest said that by 9 years; and then the tenant tendered the arrears for 9 years; and well before judgment, though it was after verdict; and he offered surety that if he was arrear afterwards by two years, that the land should answer the rest; and the court awarded that if he be arrear afterwards by one year, that he shall have scire facias to recover the land and pledges, or surety to pay 10 l. For it may be that the land is not worth the rent if the house decays. Quod nota. Br. Cessavit, pl. 5. cites 41 E. 3. 29.

4. Surety in cessavit shall be found in proper person, and not by attorney. Br. Cessavit, pl. 11. cites 50 E. 3. 22.

5. In cessavit de potura pauperum, he who is received shall tender the arrears according to the value by the year; per Hank. which

Thirn

Thirn denied; for it is *not payable to the demandant*; and therefore *quære*, in this case, if the demandant *shall recover seisin of the land*, or if the tenant upon this matter shall be excused, and shall find surety that he will not cease again, &c. Br. Cessavit, pl. 14. cites 12 H. 4. 24.

Where the
act says
that he shall
tender the
arrears it
is to be un-
derstood of
such things as
may be yielded,
as rent, &c. but
of suit, divine
service, and such
like, which cannot
be yielded, damages
shall be paid for the
same. 2 Inst. 297.

6. In cessavit of *masses, suit of court*, and the like, *where a man cannot tender the arrears*, yet this shall be in the discretion of the justices to put it into a sum certain to the plaintiff, in recompence of the suit or masses. Br. Cessavit, pl. 38, cites 14 H. 4. 3, 4. Per Skrene and Thirn.

[372] 7. In cessavit the tenant *pleaded jointenancy with another of the gift of J. K.* and they were at issue, and when the jury appeared the tenant said that *he would confess the tenure, and tender the arrears*; but they were in doubt if the finding of sureties should be by discretion of the justices, or that the demandant may relinquish the sureties or not; and the opinion of the court was, that the demandant cannot relinquish them, because the *statute is that he shall find sureties, such as the court shall think sufficient by the statute of Gloucester, cap. 4.* But the surety shall not be that the land shall incur the residue, when a religious person is demandant, for doubt of mortmain; but the collateral surety, or other penalty, shall be taken. Br. Cessavit, pl. 25. cites 19 E. 4. 5.

8. And also, if the land out of which the rent and services are issuing, consists of buildings, or of other profit casual, there he shall find surety. Br. Cessavit, pl. 25. cites 19 E. 4. 5.

* See the
Year-Book,
pl. 1. S. C.

9. And if *feme be received by default of her baron*, and she will tender the arrears, and find surety, * [she shall not find such surety] that the land shall incur the residue, because [then] she may at another time lose her land if the rent be arrear after the death of her baron. Ibid.

10. And *quære*, if an infant shall find surety that the land shall incur the residue or other collateral surety for a penalty, Ibid.

11. If tenant of the whole pleads that he was not tenant the day of the writ purchased, nor any time after, and this matter is found against him, he shall lose the whole land; for it is peremptory. Br. Cessavit, pl. 26. cites 21 E. 4. 25. per Brian.

2 Inst. 297.
S. P. and
cites S. C.

12. In cessavit the tenant shall tender the arrears in proper person, and not by attorney, though he be a lord of parliament. Br. Cessavit, pl. 39. cites 15 H. 7. 9, 10.

13. He ought to tender all the arrearages, for so are the indefinite words to be taken, as well before as after the 2 years, and damages to be allowed of by the court; but if the demandant do not allege how much is behind over and above the 2 years, &c. and that be found by the jury that finds the issue, the tenant need not tender more than for the two years, because it appears not of record, or by necessary consequence, as such arrearages as incur the

the hanging the writ; and for any arrearages incurred before this tender the lord shall not avow, because the tenant ought to have paid all. 2 Inst. 297.

14. If *A. and B. be seised to them and the heirs of A., and B. makes default, A may tender for the whole in respect of his remainder.* 2 Inst. 298.

15. The court may assess the damages by their discretion. 2 Inst. 297.

For more of Cession in general, see Abatement, Abbatory, Esdence, Rent, and other proper titles.

(A) Cession.

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1. *DEAN takes a prebend in the same church, quære if this makes a cession?* D. 273. pl. 35. Pasch. 10 Eliz.

2. *Bishoprick of Man makes cession of a parsonage in England.* Palm. 344; Lat. 235. Arg. cites it as so resolved, 15 Jac. 20 354.

3. The trial of whether cession or not doth properly belong to the common law. Winch. 63. Pasch. 21 Jac. C. B. in Thornton's case.

4. No cession by a parson's being made *titulary bishop*, as of Jerusalem, Chalcedon, or Utopia; by Banks. Arg. Lat. 235. Trin. 2 Car. See of his being made a bishop in Italy; Arg. Palm. 349.

and *ibid.* 459. says, that as to what was said by Banks in his argument, nothing was said to it.

5. The election of an incumbent to be a bishop does not make a cession, but the vacancy *accrues by the consecration*, and not till then; resolved. Carth. 314, 315. Trin. 6 W. & M. in B. R. The King and Queen v. Bishop of London and Dr. Lancaster.

For more of Cession in general, see Prerogative, Presentation, and other proper titles.

(A) Chancellor of a Church.

1. **C**Hancellor is *vicar-general* to the bishop, and if the *bishop will not chuse* a chancellor the metropolitan ought; for the bishop cannot be judge in his own consistory, and therefore if the bishop provides an *insufficient* chancellor, it properly belongs to their law to examine it; per Richardson Ch. J. Litt. Rep. 22. Hill. 2 Car. C. B. Doctor Sutton's case.

2. A prohibition was granted to the spiritual court, because the *bishop articulated against his chancellor for insufficiency*, and other misdemeanors, and prayed that he might be deprived, which they have no power to do; and they denied Sutton's case, 1 Cro. 64. to be law. 12 Mod. 47. Mich. 5 W. & M. Jones v. the Bishop of Landaffe.

[374] 3. Chancellor of a church *has a freehold in his office by grant*, and not by institution and induction, as every bishop and parson has, and therefore for such office, the proper remedy is an *assise*. Cum. 305. Mich. 6 W. & M. B. R. Jones v. the Bishop of S^t. Asaph.

For more of Chancellor of a Church in general, see other proper titles.

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}

Chancellor.

(A) Chancellor. [His Antiquity, &c.]

4 Inst. 78. cap. 8. accordingly.—
As for its antiquity in this realm, it is of no less, as our learned Selden conceives, than king Ethelbert's time, who was the first christian king of the Saxons; for in a charter of his to the church of Canterbury, bearing date in the year of Christ 605, amongst other witnesses thereto, there is *augemundus referendarius* mentioned; where *referendarius* (saith he) may well stand for cancellarius; and that the office of both (as the words applied to the court are used in the Code, Novels, and story of the declining empire) signifying an officer who received petitions and supplications to the king, and made out his writs and mandates as a *custos legis*; and though (saith he) there were divers *referendarii*, as sometimes 13, then 8, then more again, and so divers chancellors in the empire; yet one especially here exercising an office of the nature of those many, might well be stiled by either of those names. Dug. Orig. Jurid. 32. cap. 16. f. 2.

[2. Mich. 14 Jac. B. R. Upon evidence at the bar, a *charter of William the conqueror* was shewn under the seal of the said king, which was *subscribed* by several lords as witnesses, in which I saw that it was subscribed *per Mauricium regis cancellarium*, after the bishops, and before the abbots.]

3. The chancellor shall have the *presentation to all benefices* of the king *under 20 marks*. Br. Presentation, pl. 17. cites 38 E. 3. 3, 4.

S. P. But if the chancellor's presentation recites it to be

under 20 l. per ann. where it is above 20 l. per ann. the presentation is void, for such belongs not to the chancellor, and before induction, the king may revoke such presentation. Jenk. 272. pl. 33. cites Hob. 224. Ld. Chancellor's case.

4. That the *kings before the conquests had not any seals*, (the custody of which in succeeding times was one of the principal duties belonging to this office of chancellor) Ingulphus (who lived in the Norman conqueror's days) seemeth somewhat positively to affirm. Nam chirographorum confectio Anglicanum (saith he) quæ antea, usque ad Edwardi regis tempora, fidelium præsentium subscriptionibus cum crucibus aureis aliisque sacris signaculis firmata fuerant; Normanni condemnantes, chirographa cartas vocabant; & chartarum firmitatem, cum cerea impressione, per unius cujusque speciale sigillum, sub instillatione trium vel quatuor testium astantium, conficere constituebant, &c. Dugd. Orig. Jurid. 33. cap. 16.

5. Of what *power and authority* the chancellor was in these elder times, or what his office, is not easily made out, the reading, allowing, and perhaps dictating royal grants, charters, writs, &c. *keeping and affixing the king's seal to them*, as the learned * Sir Henry Spelman thought, and may also be gathered from Mr. Dugdale's Discourse of the Chancery, was the greatest part of their trust and employment, and that he had *no causes pleaded before him until the time of Ed. 3.* and those not many till the reign of Hen. 4. nor are there any decrees to be found in chancery before the 20th of Hen. 6. Be his *power and office* what it would then, it was less than that of the justiciary, who was next to the king in place of judicature; by his office he presided in the exchequer, the chancellor sitting on his left hand, as Gervase of Tilbury tells us, and by his office was the first man in the kingdom after the king; and that under his own teste, he could cause the king's writ to be made out, to deliver what sum he would out of the exchequer. The chancellor was the first in order on the left hand of the justiciary; and he was a great person in court, so he was in the exchequer, for no great thing passed but with his consent and advice, that is, nothing could be sealed without his allowance or privity, as it there appears. Brady's Preface to the Norman History, 152 (F) 153 (A).

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* Spelm. Gloss. fol. 106, 107.

6. Constituting a chancellor, does not constitute a court of equity, as in the case of chancellor of the garter, &c. There was a chancellor of the court of augmentations, and yet neither of them ever held a court of equity; per Hale Ch. J. 2 Lev. 24. Mich. 23 Car. 2. B. R.

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7. The chancellor (during the time of the grand justiciar) before the breaking the courts into distinct jurisdictions, had the custody of the seal, and therefore issued all originals returnable before the justiciar. But when the jurisdictions were distinguished, the originals relating to civil pleas were returnable before the justices of C. B. But the originals in trespass might be returnable in either court, because the plea was criminal as well as civil, but B. R. themselves made out the process in criminal matters; for in this they shared with the power of the chancery, though the chancery continued to be the foot and basis of a civil jurisdiction; but the criminal jurisdiction was returned coram rege, and not coram justiciariis de banco. Gilb. Hist. View of Exch. 7, 8.

(B) Chancellor. Keeper. Writs Original. [Not to be delayed or sold.]

[1. MIRROR of Justices, fol. 3. b. it was ordained that the court of the king was open to all plaintiffs; per quod, they should have, without delay, writs remedial as well upon the king, upon the queen, as upon other of the people, of every injury, but in or vengeance of life and member, or plaint held without writ.]

* 4 Inst. 78.
cap. 8.

[2. Mirror of Justices, * fol. 3. it was ordained by ancient kings, that every one should have out of the king's chancery, a writ remedial upon his complaint without difficulty; & ibidem, fol. 27. f. 13. in the title of the personal offences at the suit of the king, there it is thus, (&c.) I say for our lord the king, that Sim. there is perjured, and has falsified his faith against the king; for that whereas the said Sim. was the king's chancellor, and was sworn that he would not sell, deny, nor delay right, nor a writ remedial to any plaintiff; the same [376] Sim. such a day, &c. sold to such a one a writ of attainst, or other remedial, and would not grant it to him for less than for half a mark; & ibidem, fol. 64. cap. 5. among the abuses of the law it is said that one is, that writs remedial are vendible, and that the king sends to the sheriffs to take surety for so much to our use for the writ; for by the purchase of those writs it may be one. destroy his enemy tortiously; & ibidem, fol. 70. cap. 5. among the defaults of the great charter upon the 25 cap. Nullus liber homo, &c. this point is said, that the king grants to his people, that he will not sell right, nor deny nor delay it, and it is refused by the chancellor, who sells the writs remedial, and calls them writs of grace; ibid. fol. 50. Ordinance de judgment, by this seal only is a jurisdiction assignable to all plaintiffs without difficulty; and to do this the chancellor is chargeable by oath in obedience of the king's charge, that he shall not sell, deny, or delay any right, nor a writ remedial to any.]

† Fol. 385.

[3. Bracton, lib. 5. De Exceptionibus, cap. 17. Sunt quedam brevia formata super certis casibus de cursu & de communi concilio totius regni (+) concessa & approbata, quæ quidem nullatenus mutari poterint

terint absq; consensu & voluntate eorum, & ibidem pertinet ad regem, ad quamlibet injuriam compeſcendam remedium competens adhibere. Brevia tamen communia inter omnes pro jure generaliter debent observari cum sint originalia, & actionibus originem præſtent.]

[4. Rotulo Parliamenti 46. c. 3. numero 38. *The commons pray, that as in the great charter it is contained, quod nulli negabimus, nulli vendemus, aut differemus justitiam vel rectum, to the intent that of some fines which are taken in chancery in many writs contrary to the said statute, to the great impoverishment of the people, of which they pray a remedy, the said statute be declared.*]

A N S W E R.

[1. [5.] *The king will use as he and his ancestors have done before these days, and will charge his chancellor, that the fines be reasonable, according to the estate of the person.*]

(C) * Chancellor. Keeper.

* Of the keeping and re-delivery of the great seal, and receiving the same, or another on certain occasions.

[1. 10 E. 1. **ROTULO** Claſſo Membrana 6. *Hic 31 Martii venit Bathoniensis & Wellensis episcopus cancellarius regis de episcopatu suo ad curiam, quo die sigillum fuit ei liberatum, And there Membrana 7. memorandum 13. Feb. apud Garcot recessit Bathoniensis & Wellensis episcopus cancellarius regis a curia versus episcopatum suum, quo die sigillum fuit liberatum in garderoba regis; per manum Johannis de L. &c. 12 E. 1. Membrana 4. Cancellarius recessit de D. to S. & liberavit sigillum J. de R. & W. de S. custodiend. Simile, 18 E. 1. Membrana 14. 18 E. 1. Rotulo Finium Membrana 17.]*

[2. 14 Ed. 1. Membrana 4. *Cancellarius transfretavit ad partes Francie cum rege cumq; sigillo ipsius regis. 16 Ed. 1. M. 4. his return with the king, cum magno sigillo. 17 E. 1. Rot. Finium, M. 4.]*

[3. 20 E. 1. Rotulo Claſſo M. 21. Memorandum quod die Sabbati ante festum Simonis & Judæ, anno 20. apud Berewick obiit venerabilis pater Burnell cancellarius regis, & magnum sigillum regis quod fuit in custodia sua liberatum fuit in garderoba regis custodiend' eadem garderoba sub sigillo Willielmi de Hamelto qui inde breviam consignavit usque diem Mercurii proximo sequentem quo die iter arripuit versus Wells cum corpore præd' Roberti. 20 E. 1. Rotulo Finium M. 2. & Rotulo Scotiæ M. 7. the same memorandum 21 E. 1. Rotulo Finium M. 26. *Magnum sigillum domini regis commissum Johanni de Langton custodiendum in præſentia, &c. qui die crastino inde breviam consignavit.*]

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[4. 25 E. 1. Rotulo Claſſo M. 7. *The chancellor delivered the great seal to the king, and received another seal of the king's son, which should be used in the absence of the king.*]

[5. 6 Ed. 1. Rot. Finium Memb. 24. Memorandum quod die Veneris proxima post festum Sanctæ Scolasticæ Virginis apud

Dover venerabilis pater R. Bathoniensis & Wellensis episcopus cancellarius regis transfretavit ad partes transmarinas & sigillum fuit tunc liberatum in garderoba regis sub sigillo domini Johannis de Kerby cui cancellarius injunxit in recessu suo quod negotia cancellarie expediret, 6 Ed. 1. Rot. Cartarum (*) Membrana 2. parte 15, 16. 7 Ed. 1. Rotulo Patentium M. 15. *Redelivery of the seal upon the return of the chancellor.*]

^a Fol. 336.

[6. 25 Ed. 1. Rot. Finium M. 6. Dominus Johannes de Langton regis cancellarius in navi regis in qua rex tunc fuit paratus ad transfretandum in Flandriam liberavit eidem regi magnum sigillum suum quod idem rex statim recepit & illud tradidit domino de Benefede ad custodiendum; and after in the absence of E. 1. his son, locum tenens regis liberavit prefato domino Johanni de Langton pred' regis cancellario sigillum regis, quo dum idem erat in Vasconia uti in Anglia consuevit, qui quidem Johannes sigillum a manibus domini Edwardi statim recepit & in crastino inde breviam consignavit, 27 E. 1. M. 15. upon the return of the king the said chancellor, under his seal, delivered to the king the seal which he used in his absence, and he delivered it to his treasurer to be kept in the treasury; and at the same time the king delivered the great seal, which he carried with him into Flanders, to the said J. de Langton sub sigillo suo.]

He is made
Ld. Chan-
cellor of
Engl-nd, or
Ld. Keeper
of the great
seal, per
traditionem
magni sigilli
sibi per

[7. 2 E. 2. Rot. Finium M. 8, 9. De liberatione magni sigilli, &c.]

dominum regem, and by taking his oath. Forma cancellarium constituendi regnante Henrico secundo fuit appendendo magnum Angliæ sigillum ad collum cancellarii electi. Some have gotten it by letters patents at will, and one for term of his life; but it was holden void, because an ancient office must be granted, as it has been accustomed. 4 Inst. 87.

[8. 2 E. 1. Rot. Patentium M. 8 Memorandum quod die Veneris in festo Sancti Matth. Apostoli magnum sigillum regis liberatum fuit Roberto Burnell archidiacono Eborum apud Windsor, & statim inde consignavit breviam cancellarie tam de cursu quam de præcepto.]

[9. 5 E. 1. Rotulo Patentium M. 17. de sigillo Hibernico mutato.]

[10. 1 E. 3. Clauso 2. Pars M. 11. dorso, a new great seal made with some alteration, and the old seal broke, and a command to the sheriff of every county to publish it in pleno comitatu, and to shew there the new seal.]

[11. Statutum de forma mittendi extractas ad scaccarium in magna charta, 2 parte, fol. 47. b. The king to our dear William de Airemyrn, keeper of our rolls of the chancery, and to his companions, keepers of our great seal, salutem.]

[12. Rotulo Parlamenti, 14 E. 4. numero 26. the chancellor is called the chief justice in the realm.]

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Before this
act the Ld.
Chancellor

had not always the custody of the seal. D. 211. b. Marg. pl. 33.

13. 5 Eliz. cap. 18. makes the authority of lord chancellor and lord keeper to be all one.

For more of Chancellor in general, see Chancery (D) and other proper titles.

Chancery.

Fol. 370.

(A) Chancery, &c.

[1. 31 H. 6, **A** Great forfeiture for not appearing after proclamation made; but this continued but 7 years.]

[2. 17 R. 2. cap. 6. Item, forasmuch as people be compelled to come before the king's council, or in the chancery, by writs grounded upon untrue suggestions; that the chancellor for the time being, main-tenant after that such suggestions be duly found and proved untrue, shall have power to ordain and award damages after his discretion, to him which is so travailed unduely as afore is said,]

Nota per curiam, where a bill in chancery is adjudged insufficient upon demurrer, the defendant

shall not have damages; for the statute only says where the suggestion is found true or not true; whereas in this case, as here, the truth is not tried. Br. Cofts, pl. 19. cites 7 E. 4. 14. — Fitzh. Damage, pl. 44. cites S. C. — 4 Inst. 83. says that this act extends to the chancellor proceeding in a course of equity, and not to a demurrer in law upon a bill, but upon hearing the cause, and that by reason of these words in the act (duly found and proved).

[3. 2 H. 4. numero 69. the commons pray, that all writs or letters of the privy seal of our lord the king, directed to divers of the king's liege people to appear before our lord the king in his council, or in his chancery, or in his exchequer, upon a certain pain comprized therein, for the time to come shall be altogether ousted, and that every of the king's liege people shall be treated according to the rightful laws of the land anciently used.]

Prynne's Abr. of Cotton's Records, 410. cites the same petition. — 4. Inst. 83. cap. 8. cites the same.

A N S W E R.

[1. [4.] Such writ shall not be made unless in cases where it seems necessary, and this by the discretion of the chancellor, or king's council, for the time being.]

This should follow under the same letter, and so the pleas

proceed which have been divided by the error of the printers,

(A) [A. 2.]

* [379]

[2. [1.] 4 H. 4. numero 78. The commons pray, reciting the statute of 25 E. 3. that none shall be taken by petition or suggestion made to the king or his council, &c. unless by indictment or * process by original writ, and also the statute of 42 E. 3. that no man shall be put to answer without presentment before justices, &c. Notwithstanding which statutes, after this many of your lieges have been grieved by divers writs and letters, some by simple suggestions, without any thing found issuing out of chancery upon a certain pain comprized in them, to appear before you in your chancery or council, some by writs out of the exchequer, &c. others to appear before your council by privy seal, &c. to the great hin-

Prynne's Abr. of Cotton's Records, 422. cites same petition.

— See the Jurisdiction of the Court of Chancery vindicated, a treatise printed at the end of a Chan. Rep. 34. 37.

drance of your lieges, and against your laws and statutes afore-
said. May it please you to ordain, that the statutes afore-
said henceforth be fully kept; and further to ordain, that the writs
and letters afore-
said be altogether ousted, and that none of the
king's people be forced to appear or answer by any such writ or
letter, nor be put to lose their goods and chattels, and *that he,*
which for the time to come, *makes any suggestion* against any of
your subjects to yourself, your council, chancellor or treasurer,
or before your barons of the exchequer, *may find good and sufficient*
sureties to aver his suggestion; to the end that if he who is
so accused, of his own accord comes to the place where the
afore-
said suggestion is, and traverses the afore-
said suggestion, his
traverse may be received without delay; and if it be found against
him who made such suggestion, and for him who was so ac-
cused, he shall recover his *damages against the accuser*, to be taxed
by the same inquest (*) by which he is so acquitted, having re-
gard to the slender costs and labour for his defence; and further,
shall make *fine and ransom*, and his body taken to abide in prison
for one year, *for the falsity* afore-
said, and that this ordinance shall
extend as well to the time past as to come, as to suggestions de-
pending not yet discussed.

• Fol. 371.

A N S W E R.

Prynne's
Abr. of Cot-
ton's Re-
cords, 422.
the same
answer.
† See the
Jurisdiction
of the Court
of Chancery vindicated, at the end of 1 Chan. Rep: 36. 39.

1. [2.] The king will charge his officers to abstain more from
sending for his lieges than they have done before these days, but
it is not the intention of the king that the same officers should so
much abstain that they cannot send for his lieges in matters and
causes necessary, as hath been done in the time of your [† good
progenitors] our lord the king himself.

(B)

• Prynne's
Abr. of Cot-
ton's Re-
cords, 424.
says, the
print touch-
ing pleas
real and
personal,
cap. 23.
agrees with the record.—See the treatise called, the Jurisdiction of the Court of Chancery vindicated, at the end of 1 Chan. Rep. touching this statute, fol. 42, 43. &c.

2. [1.] 4 H. 4. numero 110. In the petition upon which
the act of 4 H. 4. cap. 23. *touching examinations and judgments* is
made, another part of the petition is such, [viz.] and in the
same manner as it belongs let every matter be which can be de-
termined by the common law, and that a due pain be ordained in
this present parliament against those who pursue the contrary, and
this for God and the safety of all the estates of the realm.

A N S W E R.

This by
mistake of
the printers
was made letter (C) in Roll,

1. [2.] It is answered before among the petitions of the com-
mons, numero 78. intending that which is next here before,

(D) Chancellor. *What things be may do; what not.*

[1.] *If suits are there upon recognizances, statutes, attachments, trespasss or debt, against the officers of the court, he ought to adjudge according to the course of the common law.* 11 E. 4. 9.]

4 Inst. 80. cap. 8. says, that in these cases, if the parties de-

scend to issue, this court cannot try it by jury, but the lord chancellor or lord keeper delivers the record by his proper hands into B. R. to be tried there, because for that purpose both courts are accounted but one, and after trial had to be remanded into the chancery, and the judgment to be given; but if there be a demurrer in law, it shall be argued and adjudged in this court.

[2. 3 H. 5. numero 46. The commons prayed, that whereas many people perceived themselves greatly grieved, because the writs called writs of *subpœna* & certis de causis made and sued out of your chancery and exchequer of matters determinable by your common law, which were never granted or used before the time of the late king Rich. that John Waltham, late bishop of Sarum, of his subtilty found out and began such novelty against the form of the common law of your realm, as well to the great loss and hindrance of the profits which ought to arise to you, our sovereign lord, in your courts, as in fees and profits of your seals, fines, issues and amerciaments, and several other profits to be taken in your other courts, in case the same matters were sued and determined by the common law; insomuch, that no profit does arise to you from such writs, but only 6 d. for the seal. And also, because that your justices of the one bench, and of the other, when they ought to intend their place concerning pleas, and to take inquests for the delivery of your people, they are occupied about the examination of such writs, as well to the most great vexation, loss, costs and of your lieges, which are delayed for a long time from the sealing of their writs sued in your chancery, because of the great occupations concerning the said examinations, which neither profit you nor your liege people, in which examinations there * is a great noise by divers people not learned in the laws, without any record or entry in your said places, and which pleas cannot have an end unless by examination and oath of the parties, according to the form of the law civil, and law of the holy church, in subversion of your common law, &c. and therefore they pray that every one who sues such writ thereafter, may put all the cause and matter in the writ, and if any one perceives himself grieved by such writ for matter determinable by the common law, let him have an action of debt for 40 l. &c.]

4 Inst. 83. cap. 8. cites the same petition. — Prynn's Abr. of Cotton's Records, 548. same petition.

* Fol. 372.

A N S W E R.

[The king will advise.]

(E)

4 Inst. 83.
cap 8. same
answer. —
Prynne's
Abr. of Cot-
ton's Re-
cords., 48.
Same answer.

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[1. R OT. Parliamenti 14 Ed. 3. numero 33. An ordinance was made touching the priory of West Shirborne, &c. and if any thing be done against this ordinance, that then the chancellor of England shall have power to hear the complaint by bill, and thereupon to proceed in the same manner as is usually accustomed to do daily in a writ of subpoena in chancery.]

2. In a case moved by Mr. Chamberlaine, where the lord chancellor had referred the matter to be tried at the common law touching remainders upon a lease, whether good in law or no, and the judges had given judgment upon the case in another point, in the king's bench, so as the lord chancellor remained still uncertain of that point, called the judges into the exchequer chamber. Cary's Rep. 46. cites 1 Jac.

(F) Of what Things they may hold plea, and of what not.

Prynne's
Abr. of
Cotton's
Records,
45 E. 3.
numero 24.
is not the
same petition
or point, nor
do I observe
it any where
there in
the same
year.

Prynne's
Abr. of
Cotton's
Records,
2 H. 4.
numero 65.
is not same
point.

[1. R OT. Parliamenti 45 Ed. 3. numero 24. The commons pray, that it may please the king and his good council to grant that no plea be henceforth pleaded in chancery, unless the king be properly a party in the said plea, or that the plea touch the office of the chancery, and that all manner of pleas which are there yet held, or pending in the same chancery, be sent to the common law, and that none who pursue there, or to the council by bill, be henceforth delayed of a convenient remedy, as they most grievously have been.]

[2. 2 H. 4. Rotulo Parliamenti, numero 65. The commons pray, that whereas, for the discussion of all pleas in matters traversed in chancery, the judges are drawn into chancery out of their places, in aid of the said discussion, to the great hindrance of the business of the common law of the realm, and to the great damage of the people, that it be ordained that upon such traverses the record be sent in banco regis, or banco, there to be discussed and determined, saving liveries to be made in chancery, &c.]

* A N S W E R.

* This by
mistake of
the printer
was made
letter (G)

[1. [3.] The chancellor may do it by his office, and let it be as it hath been used before these days, by the discretion of the chancellor for the time being.]

2. Chancery has power to hold plea of *sci. fa. for repeal of the king's letters patents of petitions, monstrans de droit, traverses of offices, partitions in chancery, of scire facias upon recognizances in this court, writs of audita querela, and scire facias in the nature of an audita querela, to avoid executions in this court, documents in chan-*

ccy,

cery, the writ *de dote assignanda* upon offices found, execution upon the statute staple or recognizance, in nature of a statute staple upon the act of 23 H. 8. but the execution upon a *statute merchant* is returnable, either into B. R. or into C. B. and all personal actions by or against any officer or minister of this court in respect of their service or attendance there. 4 Inst. 79, 80.

(G) [The Effect of Mispleading.]

[2. [1.] *M*ispleading in matter of form shall be prejudicial in no case in chancery, although it be in a thing in which they hold plea according to the common law. 14 E. 4. 7.]

The reason there given is, for that it cannot be said to be a

court of conscience, if the act of the clerk in the pleading should cause the party to lose the advantage of his suit, and of all his costs. Ibid. pl. 8. — Staundf. Prerog 77. a. cap. 23. cites S. C. and that it was where one had traversed an office which was sent into B. R. to be tried, and had forgot to *see his sci. fa. and yet he was suffered to go again into chancery to pray a sci. fa. upon the first traverse; for it was said, that chancery is a court of conscience, and therefore the thing that was amiss may be reformed at all times.

In the chancery by the chancellor a man shall not be prejudiced there by misleading, or for want of form, but *secundum veritatem rei*, and we ought to adjudge according to conscience, and not according to the allegation; for if a man supposes by bill that the defendant has done a tort to him, to which he says nothing, if we have conscience that he has done no tort to him, he shall recover nothing, and there are *tres powers* and process, viz. *potentia ordinata* & *absoluta*. *Ordinata* is as a law positive, as a certain order; but the law of nature has no certain order, but by whatever means the truth can be known; &c. and therefore it is said, *processus absolutus*, &c. and in the law of nature it is required that the parties be present, &c. or that they be absent by contumacy, viz. where they are warned and make default, &c. and the truth to be examined. Br. Jurisdiction, pl. 50. cites 9 E. 4. 15. — Br. Conscience, pl. 4. cites S. C. — Br. Dette, pl. 119. cites S. C.

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(H) *Of what Things they may have Conscience in Chancery. The Ordinary Power.* [As to Inrolments.]

[1. 4 E. 1. Rotulo clauso membrana 3. in dorso Angelinus de Gyfes conveys lands to Walter de Heluin, and in the end of the conveyance † it is mentioned quod præd' Angelinus venit in cancellariam regis, & dedit præd' Waltero *seisinam prati præd' cum pertinentiis* in forma præd', and there is a *sale made* by the abbot and convent de fontibus to certain merchants acknowledged by the abbot in chancery, and inrolled de 62 Saccis Lanæ & Collecta Monasterii five Clacks Loke, &c. (It seems both these were inrolments in chancery.)]

† Fol. 373.

[2. 20 E. 1. Rotulo Clausarum Membrana, 12 dorso, *Conventio facta* inter Richardum filium Alani comitem Arundell & Robertum episcopum Bathonensem & Wellensem quam 12 Januarii anno 12, *recognoverunt* in cancellaria & comes petiit ut *irrotuletur* & patet, &c.]

[3. 2 E. 1. Rotulo Clausarum Membrana, 8 dorso, *Acquittances* for the receipt of money among common persons inrolled in chancery.]

(I) Of what Actions it may hold Plea.

Writ found- [1. **T** cannot hold plea of pleas of land, 20 H. 6. 32. b.]
 ed upon a particular
act of parliament, shall make mention of the act, as where it is enacted, that the chancellor calling to him the justices of the one bench and the other, may determine causes of disseisin between A. & B. and shall call B. by subpoena; this writ shall be special and not general; per omnes, except Littleton; and hence it seems that the chancellor cannot determine plea of land or disseisin without act of parliament. Br. Brief, pl. 487. cites 14 E. 4. 1.

[2. It may hold plea of trespass. 20 H. 6. 32. b.]

[3. So it may hold plea of debt. 20 H. 6. 32: b.]

4 Inst. 85.
 cap. 8.
 S. C.

4. *Whether there was such a manor as A. in deed or reputation at such a time, or whether lands in B. were at that time parcel of the manor or no, ought to be tried at common law, and not in chancery; by the opinion of all the judges. 2 And. 163. pl. 89. Mich. 42 & 43 Eliz. The Earl of Worcester v. Sir Moyle Finch.*

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4 Inst. 85.
 cap. 8.
 S. C.

5. *The complainant alleged a disseisin to be committed of Bl. Acre at the time of a bargain and sale made to him thereof. It was the opinion of all the judges, on a reference to them by the queen, that this ought to receive trial at the common law, and not in chancery. 2 And. 163. pl. 89. Mich. 42 & 43 El. in case of Worcester (earl of) v. Sir Moyle Finch.*

4 Inst. 85.
 cap. 8.
 S. C.

6. *If A. conveys land to B. and at the time of the conveyance, A. had only a mere matter of equity to be relieved by, or only a right at the time. B. his vendee ought not to be relieved in the chancery; and if the person in possession of any of the lands had any title to them, he shall not be bound by decree in chancery from defending the same at and by the common law; by the opinion of all the judges on a reference by the queen. 2 And. 163, 164. pl. 89. Mich. 42 & 43 Eliz. in case of Worcester (earl of) v. Sir Moyle Finch.*

7. *When the suit is for evidence, the certainty whereof the plaintiff surmisseth he knoweth not, and without them he supposeth that he cannot sue at the common law. It was resolved that if the defendant makes no title to the land, then the court hath just jurisdiction to proceed for the evidence; but if he makes title to the land by his answer, then the plaintiff ought not to proceed; for otherwise by such a surmise, inheritances, freeholds, and matters determinable by the common law, shall be decided in chancery in this court of equity. 4 Inst. 85, 86. Mich. 42 & 43 Eliz. Worcester (earl of) v. Sir Moyle Finch.*

(K) What Power the Chancery hath.

Br. Error,
 pl. 95. cites
 37 H. 6. 13.
 S. P.

[1. **T**HE English court of chancery is no court of record. 37 H. 6. 14. b. per Prisot.]

Yelv. 227. Arg. cites 38 H. 6. S. P. but seems mis-printed, and that it should be 37 H. 6. —

6. — 4 Inst. 84. cap. 8. S. C. and S. P. — In cases where the court of chancery proceeds according to the course of the common law, as in the case of privilege, of scire facias upon recognizances, traverses of offices and the like, it is a record; but as to proceedings by English bill in course of equity, it is no court of record; for thereupon no writ of error lies as in the other cases. 3 Inst. 71. cap. 19. — Ibid. 123. cap. 24. S. P. that the court of equity in the proceeding in course of equity, is no court of record, and therefore it cannot hold plea of any thing whereof judgment is given, which is a judicial matter of record.

[2. The chancellor by a decree cannot bind the right of the land, but can only bind the person; and if he will not obey it, the chancellor may commit him to prison till he obeys it. 27 H. 8. 15. per Knightly.]

S. P. But judgment at common law is to recover the thing, and

shall bind the right; note the diversity. Br. Judgments, pl. 2. cites 27 H. 8. 15. — Br. Jurisdiction, pl. 53. cites S. C. & S. P. — 4 Inst. 84. cap. 8. S. P. and cites S. C.

3. Partition made in chancery is good, and may be sent into C. B. and execution may be made thereof there by scire facias and well. Br. Jurisdiction, pl. 114. cites 29 Aff. 23.

4. Affise was awarded of damages for the plaintiff upon certificate of the bishop that the tenant was a bastard, where the parliament had wrote to the justices of affise to cease, and yet they proceeded as above, by which the chancellor reversed this judgment before the council, and adjudged it in the same plight as it was upon the certificate, &c. and this remitted to the justices of affise again, who proceeded and gave judgment for the plaintiff, because the bishop had [certified] the tenant a bastard, but they had no regard to the reversal before the council; for this is no place where judgment may be reversed, quod nota. And so see that they had no respect to the matter of the reversal. Br. Judges, pl. 13. cites 39 E. 3. 14.

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5. If a feme be indowed in chancery, and after the land is recovered from her, she may have scire facias there, to be indowed de novo. Br. Jurisdiction, pl. 114. cites 43 Aff. 42.

6. In debt upon an obligation the chancellor sent superseas to them of C. B. because at another time he had decreed the matter in chancery; and the court said, that it was nothing to the purpose, and they would not obey it; for they have as high an authority to proceed upon their common pleas as the chancellor has, but superseas of the privilege by his privilege of the chancery, they would allow; for otherwise it should be inconvenient by reason of the attendance in the chancery; nota. Br. Superseas, pl. 19. cites 37 H. 6. 13.

7. Attachment in chancery against clerks of the chancery, shall be tried by common law, and not by conscience. Br. Jurisdiction, pl. 112. cites 8 E. 4. 6. and 37 H. 6. accordingly.

If matter is conscience arises upon the attachment, the

chancellor cannot adjudge according to conscience, but according to the common law; and as for the conscience, the defendant ought to make a bill to the chancellor, and then he may judge according to conscience. Br. Conscience, pl. 15. cites 8 E. 4. 5. by the justices.

8. Superseas of privilege of the chancery was cast in the exchequer for a clerk of the chancery, against Thomas Young, justice, which was not allowed for certain causes, Young asked, what

what if the chancellor will command me upon pain that I shall not sue him? Billing answered, you are not bound to obey it; for this *command is contrary to law*. Br. Judges, pl. 12. cites 9 E. 4. 53.

9. In trespass the *verdict* passed for the father, and an *injunction* came to him out of chancery *that he should not proceed to judgment* on pain of 100 l. and the court said that if the plaintiff would demand judgment, they would give him judgment. Br. Judgments, pl. 86. cites 22 E. 4. 37.

10. The chancery may *write to the mayor of Calais*, and writ of error shall issue from the chancery to Calais of judgment given there, and the chancery may *hold plea upon scire facias*, and other such writ which appertain to them, *as well extra terminum as infra terminum*. Br. Jurisdiction, pl. 16. cites 21 H. 7. 33.

11. The king cannot grant a *commission to determine any matter of equity*; but it ought to be determined in the court of chancery, which hath jurisdiction in such case time out of mind, and had always such allowance by the law; but such commissions, or new courts of equity, shall never have such allowance, but have been resolved to be against law, as was agreed in Pott's case. 12 Rep. 113. Hill. 11 Jac. The Earl of Derby's case.

12. Courts of equity cannot *agere in rem*, but upon the equity of it; for it is a certain rule, that decrees in court of equity shall not bar in *action* brought by *common law*, and therefore if chancery shall make *decree on a covenant*, on which action lies at common law, the party, notwithstanding the decree, may have his action; or if a bill be exhibited in chancery for *legacy or marriage portion*, which bill is *dismissed*, this tolls not the remedy which the party has at common law; per Glin. 2 Sid. 122. Mich. 1658. B. R. Came v. Moyer.

13. Where the court of chancery have power to *examine in a summary way*. MS. Tab. April 21st, 1727. Paxton v. Orlebar,

[385] (L) *What Persons may be there relieved in Equity,*

[1. **T**HE chancellor himself may. 16 E. 4. 4. b. Uxenbridge chancellor was.]

[2. But he cannot make a decree in his own cause. Hill. 11 Jac. in chancery, between SIR JOHN EGERTON AND THE LORD DARB-
BY, resolved.]

12 Rep. 113. The Earl of Derby's case, S. C. but in such case where he is party, the suit shall be heard in the chancery here coram domino rege. — 4 Inst. 213. cap. 37. S. C. resolved accordingly; and also that his deputy cannot decree any cause wherein he himself is party; for he cannot be iudex in propria causa; but in that case he may complain in the chancery of England. — See (M) pl. 4. S. C.

Such decree is merely void; Coke Ch. J. Roll, Rep. 246. pl. 16. said it was so held by him and Doddridge in Kelly's case, as to a decree by the chamberlain of Chaster, who is chancellor there, and seems to be S. C. — Ibid. 331. pl. 38. Coke Ch. J. cites S. C. — 3 Bulst. 117. S. C. cited by Coke Ch. J.

[3. The king may sue in chancery for equity. Tr. 14 Jac. in the chancery, between THE KING AND THE LORD WILLIAM HOWARD,
it

it was so admitted, and resolved by the two chief justices in chancery.]

(M) In *what Cases* the Suit may be there. [In regard to other Courts.]

[1. 27 E. 1. **R** Otulo finium membrana 1. Petition in cancellaria Angliæ de terra in Hibernia.]

[2. If an *erroneous judgment* be given in a copyhold court of a common lord, in an action in nature of a *formedon*, a bill may be exhibited in chancery, in nature of a false judgment, to reverse it. Hill. 8 Jac. scaccario, cited to be one PATTESHUL'S CASE.]

S. C. cited by Tanfield J. Lane, 98. Hill. 8 Jac. in the exchequer, as

a case in which he was of counsel in Ld. Bromley's time, where it was debated at large, and decreed accordingly.

[3. If a decree be made in an inferior court of equity, this upon a new bill exhibited in chancery may be decreed there, to give the more strength and aid to the first decree; as if a decree be made against one for the queen in court of the queen, which the defendant will not obey, upon a new bill exhibited in chancery, this may be confirmed and decreed there, for the better aid of the first decree. M. 16 Ja. in chancery, SIR ROBERT FLOYD'S CASE, adjudged.]

[4. A man cannot sue in the chancery of Chester for a thing which in interest concerns the chancellor there, because he cannot be his own judge, and therefore he may in this case sue in the chancery of England; for otherwise there shall be a failure of right. H. 11 Ja. in chancery, between SIR JOHN EGERTON AND THE LORD DARBY AND KELLY, resolved by the chancellor, Coke and Doderidge. Quod vide cited H. 13 Ja. B. R.]

Fol. 374.

See (L) pl. 2. S. C. and the notes there.

5. If the defendants dwell out of the county-palatine, if any of the county-palatine have cause to complain against them for matter of equity, for lands or goods within the county-palatine, the plaintiff may complain in the chancery of England, because he hath no means to bring them to answer, and the court of equity can bind only the person; * for otherwise the subject shall have just cause of suit, and should not have remedy; and when particular courts fail of justice, the general courts will give remedy; ne curiæ regis deficerent in justitia exhibenda. 4 Inst. 213.

Resolved by the lord chancellor, the Ch. J. of England, the master of the rolls, and 2 judges. 12 Rep. 113. Hill. 11 Jac. The Earl of Derby's case.

6. A bill was brought against an executor of a citizen of London, who lived out of the jurisdiction, to come and give security to the city for the orphan's portion, according to the custom of the city. The defendant by his answer submitted to do as the court should direct, but being no freeman would not be subject to the orders of the city. It was urged by the recorder, that this court used to assist the city in such like cases, and on petition used to grant subpoenas to persons to appear before the mayor in his court; to which it was answered, that this custom concerns the country as well as the city, and must be tried by verdict; and it is inconvenient for

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for country-gentlemen to be put to give security to the orphan's court by recognizance. *Ld. Keeper* decreed the plaintiffs to try the custom. *Chan. Cases* 203. *Pasch.* 23 *Car.* 2. *London Mayor, &c. & Byfield v. Slaughter.*

7. Chancery cannot by any decree bind the *Ile of Man*; nor if they should decree, could they execute the decree there, it being out of the power of any sheriff. It was so held by the plaintiff's counsel. *Chan. Cases* 221. *Hill.* 23 & 24 *Car.* 2. in case of the *Duke of Athol v. the Earl of Derby.*

8. In a bill *by way of appeal from an inferior court*, the plaintiff therein must complain of the injustice done him by the inferior court; but is not obliged to assign any particular errors, which is the difference between a bill of appeal and a bill of review; but in this they agree, viz. that both must be upon the same evidence, and you cannot examine *de novo*, though in the spiritual court they examine over and over again, and proceed upon new allegations; and *Jeffries C.* seemed to incline, that a bill of appeal would lie from an inferior court to the chancery, as at common law the *B. R.* corrects all inferior courts. *Vern.* 442. *pl.* 417. *Hill.* 1686. *Addison v. Hindmarsh.*

• In what cases a man may be relieved against his own oath, see tit. Own Oath(B).—So against his own act, see tit. Own

(N) * What Things shall be relieved in Equity.

[1. I Have heard my lord Coke cite two verses for this out of Sir Thomas More,

*Three things are to be helpt in conscience,
FRAUD, ACCIDENT, AND THINGS OF CONFIDENCE.]*

Act (A).—4 *Inst.* 84. cap. 8. *S. P.* 1st, All covins, frauds, and deceits, for which there is no remedy by the ordinary course of law. The 2d is accident, as where the servant [of] an obligor, mortgagor, &c. is sent to pay the money on the day, and he is robb'd, &c. remedy is to be had in this court against the forfeiture, and so in like cases. The 3d is breach of trust and confidence, whereof there are plentiful authorities in our books.—The jurisdiction of the court of chancery is generally thus divided; and by accident is meant when a case is distinguished from others of the like nature by unusual circumstances; for the court of chancery can not controul the maxims of the common law, because of general inconveniences, but only when the observation of the rule is attended with some unusual and particular circumstances, that create a personal and particular inconvenience; per *Ld. Cowper.* 10 *Mod.* 1. *Trin.* 8 *Ann.* in *Canc.* *Anon.*

† [387]

Br. Conscience, &c. *pl.* 23. cites *S. C.* where a man bound in a statute-merchant

[2. If a man comes to be remediless at the common law by his own negligence, he shall not be relieved in equity; as if he pays a statute or obligation without acquittance, and after is sued thereupon, he shall not be relieved in equity; for he † was not bound to pay it without an acquittance. 22 *E.* 4. 6. b.]

paid the money without an acquittance, and the chancellor said that the consuee could not deny the payment, and therefore he demanded of the justices if he might award a subpoena; and *Fairfax* said he could not, because then matter of record would be defeated by 2 witnesses, and he was not bound to pay the statute nor an obligation unless the obligee would make a release or acquittance; and *Hussey* said that it is better here to make him pay the sum twice than to alter the trial of the law; for he is not bound to pay unless the other will give a release or acquittance; and the chancellor agreed as to the statute, which is a record; but not as to the obligation, which is only matter in fact.

[3. If two men are bound to another, and the obligee releases to one, supposing this will not discharge the other, yet *ignorantia iuris non excusat*, and therefore he shall not be thereupon relieved against the other in a court of equity. 12 Ja. between HARMAN AND CAM, in B. R. a prohibition was granted accordingly to the council of the Marches; and Mich. 14 Ja. a consultation denied.]

4. Subpœna brought by R. against C. because R. had land extended to him in ancient demesne by statute-merchant, and after C. purchased the land, and had recovery by sufferance in the court of ancient demesne upon voucher, and recovered and entered, and ousted R. and he brought subpœna, and it was held that he, viz. R. cannot falsify the recovery, and therefore he shall be restored by the court of chancery by conscience. Quod nota; for there is no remedy at the common law thereof. Br. Conscience, pl. 8. cites 7 H. 7. 11.

5. And by the chancellor, where feoffment is made upon confidence the feoffor has no remedy by the common law; but he shall have remedy in the chancery by conscience. Ibid.

6. So where a man pays debt without specialty, which is due by obligation, there is no remedy by the common law; but he shall have remedy in the chancery by conscience. Ibid.

7 H. 7. 12.
a. S. P. bot.
is of paying
a debt due
by bond,

without having the writing delivered to him.——A bond entered into for payment of money, upon the payment whereof the testator promised to deliver up the bond to be cancelled, the money was paid, but the bond not delivered up. The testator dies. Afterwards the obligor sued the executor in the court of requests for relief in equity, and to have the bond delivered up. The executor suggests that he knows nothing of the payment of the money, being no ways privy thereto, and so prays a prohibition, this being more proper for a trial at law. The other prayed a procedendo, for that he had no remedy to be relieved at the common law, in regard that this promise made by the testator to deliver up the bond, is such a personal assumpsit as that the same moritur cum persona, and therefore a procedendo was granted, there being just cause for him in this case to proceed in the court of requests, and there to be relieved. Bull. 158. Trin. 9 Jac. Strong's case.

7. So if one be bound to J. S. to the use of W. N. and after J. S. releases the debt, W. N. shall have remedy in chancery by conscience. Br. Conscience, pl. 8. cites 7 H. 7. 11.

8. So where a man is indebted without specialty, and dies, his executors shall not be charged by the common law, but in the chancery, by conscience. Ibid.

9. No court would relieve long leases for 1000 years, by which the king was defeated of the wards; per Richardson J. And he said that Ld. Ellesmere used to say that there were 3 things which he never would relieve by equity, and that those were long leases as aforesaid; 2dly, concealments; and 3dly, naked promises. Litt. Rep. 3. Hill. 2 Car. C. B. Anon.

Such leases
shall be
taken to be
made by
fraud and
collusion &
per Tanfield
Ch. B. And
Coke Ch. .

J. said that the Ld. Chancellor would not relieve such a lessee in court of equity, because the beginning and ground of it is apparent fraud. Godb. 191, 192. pl. 273. Trin. 10 Jac. in the court of wards in Cotton's case.

10. C. was tenant for life of a wharf, which was carried all away by an extraordinary flood, and he brought his bill to be relieved against the payment of his rent. But all the relief he had was only against the penalty of a bond which was given [and forfeited] for non-payment of the rent; and the defendant was ordered to bring

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bring debt for his rent only. Cited by Maynard, Arg. Chan. Cases 84. as about 17 Car. 2. The case of Carter v. Cummins.

11. A sale made of lands pursuant to the statute of draining, at a most unreasonable under-value, by the commissioners of sewers, was prayed to be set aside, upon a suggestion likewise of combination between the lessee and one of the conservators; but denied, because it would be contrary to an act of parliament, and would destroy the whole oeconomy for the preservation of the fens. 2 Chan. Cases 249. Hill. 30 & 31 Car. 2. Brown v. Hammond.

12. In matters within the jurisdiction of this court it will relieve, *tho' nothing appears which strictly speaking may be called illegal*. The reason is, because all those cases carry somewhat of fraud with them, tho' it be not such fraud as is properly deceit, but such proceedings as lay a particular burden or hardship upon any man; it being the business of this court to relieve *against all offences against the law of nature and reason*; per Ld. C. Talbot. Cases in Equ. in Ld. Talbot's Time, 40. Mich. 1734. in case of Bosanquet v. Dashwood.

(O) Of what Cases they may hold Plea.

Roll. Rep. 120. pl. 3. Anon. seems to be S. C. & S. P. held accordingly, and a prohibition granted.

[1. IF a man enters into land where, &c. for a condition broken, he whose estate is defeated by this shall not have any relief in equity, unless the condition was broke by disseit or practice of him who enters for the condition broke. Hill. 12 Jac. B. R. resolved, and a prohibition granted. Mich. 11 Jac. B. R. between GLASCOCK AND ROWLY, per curiam.]

— See 2 Bull. 142, 143. S. C.

Roll. Rep. 120. pl. 3. Anon. S. C. & S. P. accordingly.

[2. But otherwise it had been if the condition had been broke by disseit, or practice of him who enters for the condition broke. Hill. 12 Jac. B. R. resolved. Mich. 12 Jac. B. R. between GLASCOCK AND ROWLY, resolved, and a prohibition denied.]

(P) In what Cases a Man shall be relieved, where he hath *deprived himself of his Remedy at Common Law*, by his own Act.

See (Q) pl. 3. S. C.

[1. IF a man be lord of a copyhold manor, and a copyhold tenant in fee of the manor surrenders it to the use of one for life, the remainder to B. in fee, and the tenant for life dies, and B. pays no fine for his admittance, but after dies, and it descends to his son; and after the son surrenders it to the use of J. S. in fee, and no fine paid for it, and also the rent for the tenement was for several years arrear; and after the lord of the manor grants the manor in fee to J. D. and after in a court of equity sues J. S. for the rent arrear, and

and the fines which were due before the sale of the manor to J. D. and alleges in his bill, that the copyholder had free land intermixed with his copyhold land, so that he could not know where to distrain for it; yet a prohibition lies, (*) because he hath deprived himself of his remedy by his own act, scilicet the sale of the manor, and therefore shall have no remedy in a court of equity, especially in this case he shall not have remedy against J. S. the purchaser, for the fines and arrears of rent due before his purchase. Mich. 10 Car. B. R. between SERJEANT HITCHAM plaintiff, and FINCH AND BLOCK defendants, resolved per curiam; and a prohibition granted accordingly to the court of requests, though this matter being there pleaded, was before over-ruled upon demurrer to the bill.]

• Fol. 375.

2. A woman administratrix sued in the court of requests, complaining that she took administration of her husband's goods thinking he was out of debt, except some small sums which he owed to labourers, &c. which she had paid; and afterwards debt upon specialties were brought against her, upon which she obtained an injunction there, but a prohibition was granted per tot. cur. Cro. J. 535. pl. 20. Pasch. 17 Jac. B. R. Jobbin's case.

3. A. a termor for years, orders a scrivener to make an assurance thereof to B. rendering rent according to an agreement between them; and the scrivener grants the intire term rendering rent. A. shall have no remedy in equity for the rent, for if the assurance is bad, and yet there shall be a remedy, to what purpose is the common law? 2 Roll. Rep. 434. Trin. 21 Jac. Hudson v. Middleton.

4. An annuity was granted by the father to the younger son, who delivers the deed to a friend who loses it. And the younger son sues the eldest at the council at York. Doderidge said, there was not any remedy or ground of equity in this case; for the deed might be upon condition, or other limitation; and the deed might be lost by practice or covin, to charge the heir absolutely. This case was referred to justice Hutton. H. 2 Car. Noy 82. Vincent v. Beverlye.

Lat. 148.
Hill. 2
Car. Bright-
man's case,
S. P. but
there the
deliv ry was
to one of his
elder bro-
thers to
keep, who
went into

Ireland, and in the removal of divers writings this annuity was lost, and now he sued in the council of York for his annuity against his eldest brother who was to pay it, and grounded his suit upon this equity. Per Doderidge, he shall not be relieved here; for it was his own folly to deliver them to such persons as had no more care of them; and perhaps there was a condition, or the like in the deed, or a limitation whereby the annuity should be determined; and he by combination would lose the writing, so charge the eldest brother absolutely; but if the deed had been lost casually, as by fire or the like, there he shall have relief in equity; as it was in the case of Vincent v. Beverley. — See tit. Fail. (U. a) (W. a) and tit. Surety (B).

5. If the lessor enters upon his lessor and suspends his rent, he shall not have remedy in equity; per Doderidge obiter & non fuit negatum. Lat. 149. Trin. 2 Car.

Noy 82.
S. P. in
totidem.
verbis.

6. C. purchased church lands in the rebellion in fee, and afterwards sold them to H. and covenanted that he was lawfully seised, &c. but some proof was that it was declared upon the sealing, that the vendor should undertake for his own act only. It was decreed that the defendant, who had recovered by judgment at law,

Ibid. The
like case and
decree, said
to be 6
months be-
fore, be-
tween Far-
rer & Far-
rer.

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H h

should

should acknowledge satisfaction on the judgment and pay costs. Chan. Cases, 15. Mich. 14 Car. 2. Coldcot v. Hill.

7. If after assignment of a bond, the assignee sues the bond and gets judgment, and the judgment affirmed in error, and after execution taken out; but before the return thereof, the assignor gives a warrant of attorney to acknowledge satisfaction upon record, and thereupon a superseas is sued out to stop the execution; and upon motion to set aside the superseas, this was held relievable only in equity. 10 Mod. 102. Mich. 11 Ann. B. R. Parker v. Lilly.

[390] (Q) What Things may be relieved there, not against a Maxim in Law.

S. C. cited
Lat. 146.
See tit.
Fairs (U. a)
W. a) and
Surety (B)
Underwood
v. Stancy.

[1. IF a man loses his obligation in which J. S. is bound to him, yet he shall not be relieved for the debt in a court of equity, because it is against a maxim in law to have an action upon this, without shewing it in court. Mich. 3 Car. B. R. between MILLER and REAMES per curiam, a prohibition granted to [the court of] requests, and they would not grant a procedendo, though there was an affidavit made that the obligation was lost.]

[2. If a man seised of lands in tail for a valuable consideration bargains and sells to another in fee, and covenants that he and his wife will levy a fine for the better assurance to the bargainee; and it is agreed that 30 l. parcel of the consideration, shall be paid to the baron upon the consuance of the fine by the baron and feme, and after the baron and feme acknowledge a fine before a judge in the circuit in the vacation; and after the said 30 l. is paid, and received by the feme, the baron being sick in his bed, and after the baron dies before the term, and thereupon the feme stops the passing of the fine, and after brings a writ of dower, the bargainee shall have no remedy in equity against the dower, because it is against a maxim in law, that a feme covert shall be bound without a fine. Mich. 5 Car. between HODY & LUNN, resolved by the master of the rolls, Justice Jones, and the masters in chancery, and the plaintiff dismissed accordingly as to dower; and they then said it was so resolved before in Master Dewe's case, one of the six clerks; but the court agreed, that if the feme had any personal estate, as executrix, or administratrix to her husband, she shall be liable for that; and thereupon a commission was granted to enquire of the assets.]

See (P) pl.
1. S. C.

[3. If A. be seised of a manor in which there are copyholders of inheritance rendering rent, and the rent being arrear, the lord bargains and sells the manor to J. S. by which he hath destroyed his remedy to distrain, and admit that he could not have an action of debt for these arrearages, as if they had been due out of a freehold, he should not, yet he shall not be relieved in equity for them, because it is against a maxim in law, in as much as by law he hath by his own act destroyed his remedy. P. 10 Car. B. R. between

between SERJEANT HITCHAM plaintiff, and FINCH & BLOCK defendants, resolved, and a prohibition granted to the court of requests accordingly after a demurrer upon this matter there overruled.]

4. In former times the chancellor used to send for the judges, to know when equity should be admitted against the common law, and when not; because it is not to be altered for every fancy, and it was a great doubt in what points equity should hold place; agreed by Doderidge and Chamberlain J. 2 Roll. Rep. 434. Trin. 21 Jac. B. R.

(R) What Things may be relieved there. Not a [391] Thing against a Maxim in Law.

[1. THE chancery shall not relieve a man against a maxim of the law upon a matter of equity, by which the maxim shall be crossed, for this is to (*) make a new law. M. 16 Jac. between ROSWELL & EVERY, by the chancellor, Doderidge and Hutton resolved.]

Fol. 376.

[2. An executor cannot be compelled to account in a court of equity for things received by the testator as bailiff or receiver, &c. because he is discharged by good reason, by a maxim of the common law, because his testator might have waged his law, and might have had better knowledge to discharge himself than the executor may. M. 13 Jac. B. R. between POWEL & HARRIS, per curiam resolved; contra M. 14 Jac. B. R. where a prohibition was denied twice by the court, in such case to the council of York, between Wilbye & Powel.]

Roll. Rep. 263. pl. 33. S. C. & S. P. accordingly; per cur. And a prohibition was granted to the Marches of Wales, (where the bill was brought)

nisi, &c. Afterwards the court seemed to be of the same opinion, but the prohibition was stayed by assent, and the matter referred to arbitrators.

[3. [So] An executor or administrator cannot be charged in a court of equity for a contract made by the testator, of which no remedy lies at common law; for this is against a maxim of law. Contra M. 4 Jac. B. R. between RICHARDSON & SIR MOYLE FINCH, per curiam.]

G. borrowed money of A. to whom S. was executor, and being possessed of a

term for 5 years, secured it to A. by deed, with a proviso of redemption. G. sued S. in the court of requests upon this; and shewed further, that there was a verbal agreement between them, that if the money was not paid at the day, A. should take the corn growing on the land, and if the corn amounted to the value, G. should have his term again, and that he reaped the corn, which well satisfied the money, and yet he continued possession of the term, which after came to S. and is now expired, and so prayed that the defendant might account for the profits. The defendant moved for a prohibition. Per Richardson, though the trust is contrary to the indenture, yet such averment is good, notwithstanding the proviso; but because the executor shall account to no one but the king, and the years are now spent, and though he occupied himself, yet the profits are assets; and if he shall recover in a court of equity, there shall be a devastavit against the executor, and a prohibition was granted per tot. cur. Litt. Rep. 221. Mich. 4 Car. C. B. Goffe v. Skipton. — Het. 117. S. C. but is only a bad translation of Litt. Rep.

Inestate took the profits of the lands of the plaintiff, being within age, by force of a trust reposed in him by the father of the plaintiff by his last will, the yearly value of which lands was 80 l. and she inherited the profits from the 23d year of queen Eliz. till the 33d year of her reign, and was parcel of the profits purchased lands in fee, which descended to his heir, and left off to his administratrix, one

of the defendants, to satisfy the plaintiff, all debts paid. The question was, whether in this case the administratrix might not be charged in equity for the said mean profits? and Sir Thomas Egerton, master of the Rolls, said, that he had seen a case in chancery in anno 34 H. 6. resolved by all the judges of England remaining in the Tower, that where the feoffees to use took the profits of the land, and received the rents, and made their executors, and died, leaving assets to satisfy all debts, over and above the said rents and profits, that the executors should be charged to satisfy cessuque use for the said rents and profits; and accordingly it was decreed in Mears's case against the defendant; but whether the heir should be contributory or no, it was doubted. 4 Inst. 86, 87. Mich. 37 & 38 Elis. in *canc.* *Mears v. St. John*, administrator of Alnion.

Roll. Rep. 338. pl. 53. S. C. and a prohibition was granted to the court [4. One jointenant cannot sue his companion in a court of equity for the taking of all the profits, because it is against a maxim in law. H. 13 Jac. B. R. between FIN & SMITH resolved, and a prohibition granted.]

of requests where the suit was; for the law gives him no remedy. — In such case there is no remedy, unless it were done on an agreement or promise to account. Cary's Rep. 29. 8 June, 44 Elis. Anon. — See tit. Prohibition (I. a) pl. 4. *Portington and Beaumont*.

* Two tenants in common were of a hall and a parlour within the hall, and the one suffered the other to come into the hall, but kept the parlour within it locked; it was ordered in the court of requests, that their remedy is at common law, but for the inner room they confess an ouster, and prohibition was granted, and prayed to be dissolved, but *Haughton J.* said it could not; for this is an ouster at common law. 2 Roll. Rep. 434. Trin. 21 Jac. B. R. in case of *Hudson v. Middleton*.

* [392]

[5. If an infant sells lands for money, and purchases other lands with the money, yet this sale by the infant shall not be helped by the chancery, because the person of the infant is disabled by a maxim in law. M. 16 Ja. in *ROSWELL AND EVERY*, by the chancellor, *Dodderidge and Hutton*.]

[6. The assignee of a covenant cannot sue in a court of equity to have benefit of the covenant, for this is against the law to assign a covenant. M. 11 Ja. B. R. between *WOODFORD AND HOLLAND*, per curiam, a prohibition granted to the court of requests for such a suit there.]

[7. An executor in a court of equity ought not to be compelled to pay legacies before obligations forfeited, for this is against the common law. Mich. 11 Ja. B. R. between *WIGGLESWORTH AND EVERET*, resolved.]

† Br. Conscience, pl. 13. cites S. C. and says it was in a manner agreed, that if the vendee confesses this matter, he shall render the land to the feme, and otherwise the feoffee in use shall be recompenced for the land. — [8. If a feoffment had been made to the use of a feme, who took husband, and they had sold the land to a stranger for money, and the feme had received the money, and upon the request of the baron and feme, the feoffees had made an estate to a stranger accordingly. After the death of the baron the feme might have brought a subpoena in chancery against the feoffees, and recovered, for the chancery shall not help this void sale made by a feme covert, for she could not consent to it, and all the act was the act of the husband only, and the receipt of the money by her was not to any purpose, inasmuch as she could not have any advantage thereof, but the baron. † 7 E. 4. 14. b. by all the justices and chancellor; accordingly this case was agreed M. 16 Ja. in chancery by the chancellor, *Dodderidge and Hutton*, in *ROSWELL's* case. † 18 E. 4. 12.

Fitzh. Subpoena, pl. c. cites S. C. accordingly. — S. C. cited Roll. Rep. 219. pl. 23. Trin. 13 Jac. B. R. Arg. in *Rushwell's* case. † See pl. 9. S. C.

[9. If a feme makes a feoffment to her own use, and after takes husband, and after makes her will, that the feoffees shall make an estate in fee to her husband, and dies, this devise shall not be made good by chancery, because all acts by a feme covert are void, and the law of confidence follows this. 18 E. 4. 11. b. by all the justices.]

Br. Conscience, pl. 28. cites S. C. accordingly. Br. Testament, pl. 13. cites S. C. and

by all, præter Tremalle, the will is void; and yet per Vavisor, feme covert may make testament, by agreement of her baron, of an obligation made to her before the coverture, and of paraphernalia, viz. her apparel.

[10. If a man had devised lands to another for a valuable consideration at the common law, before the statute of wills, where there was no custom to warrant it, this could not be helped by chancery, because this is against a maxim of the common law. M. 16 Ja. in ROSWELL AND EVERY's case, agreed by the lord chancellor, Dodderidge and Hutton.]

Roll. Rep. 192. pl. 32. Pasch. 13 Jac. B. R. Rushwell's case, S. C. and ibid. 218. pl. 19. Trin. 13

Jac. B. R. S. C. and 219. pl. 23. S. C. but S. P. does not appear clearly, but seems to be intended, ibid. 220. in principio.

[11. If a man that is non compos mentis aliens land, this shall not be restored to himself by chancery upon a matter of equity, * against the maxim of the common law. Mich. 16 Jac. in ROSWELL AND EVERY's case, by the lord chancellor and Dodderidge agreed.]

Fol. 377.

Roll. Rep. 219. pl. 23. Rushwell's case, S. C.

but S. P. does not appear, but cites 4 Rep. Beverley's case, that a man of non sane memorie shall not be aided in chancery to avoid his own obligation, because it is against a maxim in law.

* [393]

[12. A purchaser of a reversion shall compel the lessee in chancery to attorn, where he hath no means to compel him by the common law; for this is a particular mischief not against any maxim. Mich. 16 Jac. in ROSWELL's case, agreed per Dodderidge, according to several precedents in chancery shewed to him.]

I do not observe this point any where in Rushwell's case, S. C. reported in

Roll. Rep.—See tit. Rent (M. c) per totum.

[13. If there be lessee for life, the remainder for life, the reversion or remainder in fee, and the lessee in possession wastes the land, though he is not punishable by the common law during the remainder, yet he may be restrained in chancery; for this is a particular mischief; and though he is not punishable during the continuance of the remainder, yet it is a tort, and he is punishable after. Mich. 16 Jac. in ROSWELL's case, agreed per Dodderidge; according to the precedents of the court of chancery which were before cited.]

Mo. 554. pl. 748. Pasch. 41 Eliz. Ld. K. Egerton said, that he had seen a precedent in time of R. 2. where in such case it was decreed in chancery,

by the advice of the judges, on complaint of the remainder-man in fee, that the first tenant should not do waste, and that an injunction was granted.—See tit. Waste (R. a) (S. a) per totum.

[14. If by the usage of a certain country land is to lie in common every third year, and the owner of this land by deed leases this land for 20 years then next ensuing, provided every third year, when the land is to lie in common, shall not be reckoned among the 20 years;

H h 3

though

though this proviso is void by the common law, yet it shall be helped by the chancery, and the lessee shall have the 20 years, leaving out every third year; for this is not against any maxim of law, but it is according to the intent of the deed. Mich. 16 Jac. in chancery, between FLEET AND COOPER, decreed.]

[15. If there be an agreement upon marriage between A. and E. that a jointure shall be made by grant of a rent to B. (the father of A. the feme) his executors and assigns for the life of the feme, and that for default of payment B. the father shall have an estate for certain years in the land, out of which this issues, if A. the feme so long lives, and after the rent is granted accordingly, and by several subsequent acts the grant is confirmed, and the wife of C. the father of E. the baron, joins in a fine with C. her husband, for the better settlement thereof, and after both the barons grant a lease for years, in trust for the feme of C. to the intent that she should pay the said 80 l. rent to A. the feme, and that she herself shall have 40 l. a year, and that if the rent be not paid, that the lease shall be void; after B. the father of A. dies, without making any assignee of the rent, by which the rent is extinct in law; yet this shall be made good against the wife of C. and the lessees in trust for the wife of C. because she gave her consent thereto by fine, and the trust is to be guided in a court of equity. Tr. 3 Car. between Sir RICHARD BULLER V. CHEVERTON AND POLWHEEL, decreed in chancery by Justice Jones.]

Roll. Rep.
86. pl. 36.
S. C. accordingly...
A decree in
chancery
against an

[16. A court of equity cannot compel an executor to perform a decree made there against the testator before a statute acknowledged by him. Mich. 12 Jac. B. R. between WALTER AND HEYFORD, per curiam, and a prohibition granted accordingly to the council of York.]

executor shall not be satisfied before an obligation made by the testator, which becomes due after his death; per Roll J. Sty. 38. Trin. 23 Car. B. R. in case of Eccles v. Lambert.

[394] [17. If two submit themselves to the arbitrament of J. S. of all controversies, ita quod, &c. de præmissis, &c. and J. S. makes an award of part only, so that the award is void in law, this shall not be made good in a court of equity; because the award was merely void by law. P. 7 Jac. B. between ROBINSON AND BISS, adjudged, and a prohibition granted to the council of York.]

[18. If a man for 100 l. assumes to make a lease for 21 years, and dies, his heir is not compellable, in a court of equity, to make the lease; (*) for this is against the common law. Mich. 3 Jac. B. between CHAPMAN AND BOIER, per curiam.]

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[19. If a feme, tenant in dower, sues in a court of equity for damages, where her husband did not die seised, a prohibition lies; for it is against the common law. Mich. 5 Jac. B. between SWEETMAN AND REVET, resolved, and a prohibition granted to the court of requests accordingly.]

[20. If A. grants a rent out of land to B. and after grants the land to the son and heir in fee, and covenants that it is discharged of all incumbrances præter the said rent, and after B. loses his deed of the grant of the rent, and therefore sues in a court of equity for the rent,

rent, a prohibition lies; for it is a maxim in law that none shall recover such rent without shewing of a deed.

B. R. between BEVERLY AND UNITE; a prohibition granted to the council of York; and Mich. 2 Car. a consultation was prayed, and denied, but referred.]

[21. If a man *sues* in a court of equity to have *seisin of a rent-sock*, a prohibition lies for the cause aforesaid; for this would be to make a new law. Mich. 2 Car. per Doderidge. M. 5 Car. B. R. between NORRIS AND PRICE, agreed per curiam, where the rent commenced by grant.]

[22. But if a rent be devised by will in writing, a court of equity may compel the tenant of the land to give seisin, because by indentment the tenant of the land was inops consilii at the time of the devise. Mich. 5 Car. B. R. between NORRIS AND PRICE, per curiam, upon a prohibition to Wales,]

S. P. cited by Ld. C. Ellesmere as decreed, because without seisin the devisee has no remedy, and yet the rent is in the devisee by the devise. — Ibid. 626. pl. 829. Trin. 42 Eliz. Webb v. Webb, the tenant was decreed in chancery to pay a rent-sock devised by a will out of land, notwithstanding no seisin was had of it; and says that 44. a like decree was in case of Ferrey v. Tanner. — See tit, Rent (M. c) per totum.

Mo. 805.
pl. 1092.
Mich. 5
Jac. incane.
in the case
of Shute v.
Mallory,

23. A prohibition was prayed to the court of requests upon this suggestion, that *one executor sued another to account* there; and an executor at the common law, before the statute of Westm. 2. cap. 11. could not have an account for cause of privity, and now by that statute they may have an account, but the same ought to be by writ, and therefore no account lies in the court of requests. Mar. 99. pl. 171. Trin. 16 Car. Anon.

24. If a man has land *subject to the payment of a rent-charge*, and grants part of the lands to B. and covenants that that part should be discharged of the rent, yet this is not such a real covenant that shall run with the land, and charge the other lands with the whole; but it is only a personal covenant, which must charge the heir only in respect of assets. Hard. 87. Mich. 1656. between Cook and Arundel, decreed in scaccario accordingly.

But where M. was proprietor of 36 shares in the New River water, and had agreed to sell 14 shares thereof to B. and

there being a charge on the 36 shares of 500 l. a year rent to the crown in fee, and 100 l. a year to H. for life. M. covenanted to discharge the said 14 shares which he had agreed to sell to B. from those rents; and it was decreed that the plaintiff who claimed under B. should enjoy the said 14 shares discharged of those rents, and that the other 22 shares should be subject to the plaintiff's indemnity * therein, notwithstanding it was insisted that H.'s covenant to discharge the 14 shares of those rents was merely personal, and did not, nor could charge the whole rents upon the 22 shares. Chan. Cases, 232. Trin. 23 Car. 2. Cornbury v. Middleton.

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25. In case of an executor who commits a devastavit and dies, his executor shall be charged in chancery, though he cannot be charged at common law. Admitted. Chan. Cases 303. Mich. 29 Car. 2. in Vanacre's case.

Ibid. 304. in a nota, says, that the executor in case of a devastavit is in

nature of a trustee of an estate; but that in the principal case the testator was a trespasser, to which the executor is no ways liable.

(S) In what Cases a Man shall be *relieved against a Statute.*

[1. **W**HERE there is an *apparent fraud, or a dubious case by law, of which the party could not have consufance*, there it shall be aided by a court of equity against a statute. Mich. 16 Jac. said by the lord chancellor in LONG'S CASE, and ROSWELL'S CASE.]

[2. *As if after the 13 Eliz. cap. 10. a dean and chapter had leased lands to the king for a valuable consideration, at which time the law was taken, that the king was not bound by the statute, so that such lease was good, and the king assigned it over, and now the law is taken that the law is contrary, scilicet, that the king is bound by the statute; yet this shall be made good by this court against the statute, because he could not know the law in a matter so doubtful.* Mich. 16 Jac. B. R. in chancery, between LONG AND THE DEAN AND CHAPTER OF BRISTOL, adjudged, and decreed that the lessee shall enjoy it, paying 200l. to the dean and chapter; and such a decree was made between MAUDLIN-COLLEGE AND WOOD.]

[3. *If the father, by his will in writing, devises lands to his younger son, and the elder son knowing thereof enters into the land, and disseises the father, and so continues till the death of the father, by which the will is void, yet because it was made void by deceit and covin, it shall be made good by chancery.* Mich. 16 Jac. by the lord chancellor in ROSWELL'S AND EVERY'S CASE.]

[4. *If a man in a court of equity sues for a rent, and the defendant pleads the statute of limitations of 32 H. 8. and alleges that the plaintiff, &c. had not any seisin of the rent within 60 years, according to the statute, and shews that this which is demanded is no rent-service, for he shews that king E. 6. was seised of the land, the court ought not to proceed against the statute to relieve the party; for it is against the said statute; and if the courts of the common law are bound by the statute, the courts of equity are also bound; and when a man hath but one right * of action, if the action is taken away the right is taken away, otherways where he hath a right of entry.* Mich. 14 Car. B. R. between MOUNTAGUE AND GOLDSMITH, which concerned the hospital of St. Catharine's, resolved per curiam, and a prohibition granted accordingly to the court of requests.]

In what cases relief may be had in equity against the statute of limitations, see tit. Limitation (T) per to.

* Fol. 379.

tum.—By justice Foster and B. kes Ch. J. a trust is not within the statute of 21 Jac. cap. 16. of limitations, and therefore no lapse of time shall take away remedy in equity for it; but for other actions which are within the statute, and the time elapsed by the statute, there is no remedy in equity; and that (they said) was always the difference taken by my Ld. Keeper Coventry; but justice Crawley said that he had conferred with the lord keeper, and that he told him that remedy in equity was not taken away in other actions within this statute. Mar. 129. pl. 207. Mich. 17 Car. Anon.

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See Roll. Rep. 192. pl. 32. Ruf. well's case.

[5. *If a man, having lands held in capite, conveys 2 parts of his lands to uses within the statute of 32 & 34 H. 8. of wills, and after devises that his executor shall sell the other 3d part for the payment of his*

his debts, and dies; and the executor, by force of a decree in chancery compelling him to it, sells the land for a valuable consideration, and with the money pays the debts to which the heir is liable being due by obligation, so that the purchaser hath much equity of his side, yet this 3d part being void by the common law, and 32 & 34 H. 8. it shall not be made good against the statutes by chancery, because it is directly against the statutes; for this would cross the statutes, and then it would be in the power of the court of chancery to make a new law. Mich. 16 Jac. in chancery, between ROSWELL AND EVERY, resolved by the lord chancellor, the master of the rolls, and justice Doderidge, and justice Hutton, upon argument, and a decree before made to the contrary reversed accordingly.]

S. C. but S. P. does not clearly appear; but is as to the executors being committed for a contempt to the court.

[6. If tenant in tail makes a lease for years not warrantable by the statute of 32 H. 8. this shall not be made good in chancery upon a good matter of equity. M. 16 Jac. in ROSWELL'S CASE, per Hutton.]

[7. So if tenant in tail bargains and sells the lands, yet this cannot be made good in equity against the statute, by which he is disabled to bar his issue. Hobart's Reports, between CAVENDISH AND WORSLEY, resolved.]

Hob. 203. pl. 256. S. C. resolved by Ld. Keeper, and Hobart Ch.

J. Assistant.—S. P. accordingly by Chamberlaine J. 2 Roll. Rep. 434. Trin. 21 Jac.——See tit. Tayle (E).

[8. A testament naval or military made of lands without writing, for want of such things requisite thereto, yet this devise per parol shall not be helpt against the statute. Mich. 16 Jac. in ROSWELL AND EVERY'S CASE, by the lord chancellor.]

9. If the lessee of a prebendary or bishop mortgages his lease, and after the day pays the money, and then surrenders and takes a new lease from the prebendary or bishop, he hath equity against the mortgagee; but if the prebendary, &c. dies, this equity will not make the second lease good against the successor against the statute which binds all men, and has no saving of such rights of equity, and the chancellor cannot add to the statute to make a saving which the statute has not made. 1 Chan. Cases 228. Pasch. 16 Car. 2. in case of Cooke v. Bampfild.

(T) Chancery, and Courts of Equity. In what Cases a Man shall be relieved there against a Deed not against the Agreement of the Parties.

See tit. Fairs (Q. 2) averments as to deeds in equity.

[1.] If a man makes a conveyance of a house to the use of himself for life, without impeachment of waste, the remainder to another, and after the lessee will pull down the house, yet he in the remainder shall not be relieved in the court of requests upon an averment that their agreement was, that the lessee ought not to do any voluntary waste, for he shall have no averment against a deed.

But see tit. Waste (R. 2) pl. 20. the case of Vane v. Barnard, and the notes there, where it is

Mich.

contrary was decreed in chancery; Mich. 8 Jac. B. ALICE PARAWICK's case resolved, and a prohibition granted.] And see several other cases there to the like point. And see also (S. a) *ibid*.

* [2. If *A. leases lands to B. without impeachment of waste*, and after *B. builds a barn upon part of the land, to put in certain tithes which he obtained by lease of another*, and after the lease of the tithes being expired, and having no use of the barn, he suffers it to lie without use, per quod beggars inhabit there in their passage, which draws an inconvenience to the neighbours, and thereupon *B. pulls down the barn before the end of his lease of the land*, and thereupon *A. sues him in the court of requests for damages*, and *B. there justifies by force of the clause without impeachment of waste*, and the other matter, and notwithstanding a decree was there made, that *B. should pay 10 l. damages to A. for it*, a prohibition lies in this case, because this is against the express agreement of the parties. Mich. 14 Car. (+) B. R. between the master of the hospital of St. OSWALD AND SALWAY, resolved per curiam, and a prohibition granted accordingly.]

† Fol. 380.

S. C. cited by Ld. C. Nottingham. 2 Freem. Rep. 55. pl. 61. Paich. 1680, that an injunction was granted. See tit. Waste (R. a) pl. 14. S. C. and the reason.—And 2 Freem. Rep. 54, 55. Ld. Chancellor said, that if there be tenant for life, without impeachment of waste, if he goes to pull down houses, &c. to do waste maliciously, this court will restrain, although he has express power by the act of the party to commit waste; for this court will moderate the exercise of that power, and will restrain extravagant humorous waste, because it is pro bono publico to restrain it; and he said, he never knew an injunction denied to stay the pulling down of houses by tenant without impeachment of waste, unless it were to serjeant Peck, in my lord Oxford's case, and he said he did believe he should never see this court deny it again.

[3. But if a lessee for years, without impeachment of waste, about the end of his term, intends to cut down all the timber trees, an injunction lies out of a court of equity upon this matter, to stop the cutting down of the trees, notwithstanding the agreement of the parties, because this is against the good of the public to destroy the trees, and the suit there is to hinder and prevent it, and not to have any damages after it was done. Mich. 14 Car. B. R. in the said case of Salway, said per Bramston, that this was the bishop of WINTON's case, which was referred out of the chancery to the judges, and by their advice an injunction granted for the cause aforesaid.]

Cary's Rep. 23. cites S. C. and because he had not quid pro quo, but only things in action, and the seller would not bring action upon them for the benefit of the vendee, 'it was ordered here, by the assent of the judges,

4. In debt the case was, that where a man had bought certain debts of one B. due to him by several, for 40 l. and was to bind himself in an obligation for the 40 l. and sued in chancery for conscience, because it is a chose en action, and therefore he has nothing for his money, and cannot sue for it, but the vendor may sue and release, and therefore he brought subpoena to be discharged of the obligation in conscience, and the defendant appeared, and the chancellor awarded that the obligation shall be brought in to be cancelled, and for not doing it the obligee was committed to the Fleet, there to remain till he did, and there he remained, and sued the obligation, and the defendant pleaded this matter in bar, and by the best opinion it is no plea; for per Prisot and others, the chancery is not a court of record, but to repeal patents of the king upon a sci. fa. and upon pleas of debt, &c. there between parties

parties privileged, and such pleas discussed there is a good bar at the common law, for upon those writs of error lies in parliament; but as to matters of subpoena there it is no court of record, and therefore of this does not lie writ of error, and when the party cannot have writ of error if the court errs, there by such awards he shall not be barred; for the chancery can only examine the conscience, and if they make a decree, and the party refuses to obey it, they can do no more than award him to prison, there to remain till he does, and if he will remain in prison there is no remedy; for there he may proceed at common law, and the decree is no bar, Br. Jurisdiction, pl. 53. cites 37 H. 6. 1.

thereto called, that the vendor should bring in the obligation to be cancelled.

5. *A. possessed of a term for years, assigned the same to trustees, and then purchases the fee, and then settles the same on his wife for her jointure, and dies; the wife, in consideration of money, releases to the executors all her right to the personal estate, and afterwards the fee is evicted, and it appearing by the proof, that the agreement which begot the release, was before the title to the inheritance was avoided, and concerning that which was then looked upon as personal estate, and not touching the lease; and that, notwithstanding the release, the feme continued the possession. It was resolved, that the release should not bar or prejudice the plaintiff's title in right to the lease; and it was decreed, that she should hold for so many years as she lived, and that if the lease were renewed, she pay proportionably to her estate for life, that the jointure should hold for so many years as she lived, and then to go to the executors. Chan. Cases 47. Pasch. 16 Car. 2. Bawtry v. Ibbon.*

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6. *A bond was entered into before the wars, conditioned to pay 40l. a year, for 12 years, out of the profits of an office, which was [afterwards] taken away by the usurpers. The office was revived, and the obligor being sued upon the bond, he exhibited his bill to be relieved against the bond. The obligee insisted, that the office continued some part of the 12 years, and being now revived, the obligor ought to pay the 40l. a year for 12 years, or be dismissed; for the obligee, having the law with him, ought not to be hurt in equity, without satisfaction according to the condition. Decreed, that the obligor pay the 40l. for so many years as the office continued, and thereupon the bond to be delivered up. Chan. Cases, 72. Hill. 17 & 18 Car. 2. Lawrence v. Brasier.*

7. *B. purchased a manor, and a little before the purchase a copyhold escheated, which was not intended to pass, and therefore was left out of the particular, but the conveyance was sufficient in law to pass it. The vendor exhibited a bill to be relieved, and had a decree to hold of B. the purchaser. 2 Vent. 345. Trin. 32 Car. 2. in Canc. Beverham's case.*

8. *Where a man buys land in another man's name, and pays money, it will be in trust for him that pays the money, though no deed declaring the trust, for the statute of 29 Car. 2. called the Statute of Frauds, does not extend to trusts raised by operation of the law. 2 Vent. 361. Pasch. 35 Car. 2. Anon.*

9. *It is not a true rule, that where an action cannot be brought at law on an agreement for damages, there a suit will not lie in equity for*

for a specific performance; per *Ld. C. Macclesfield*. 2. *Wms.'s Rep.* 244. *Mich.* 1724. in case of *Cannel v. Buckle*.

In what cases the *intention* shall be favoured in equity, so as a deed shall be construed by it, see tit. *Intent (C)*

In what cases chancery will relieve *against securities* given, see tit. *Securities*, and the several divisions there.

(U) What Persons, in respect of their Estate, shall be bound [by Agreement made with Persons interested before in the same Thing.]

[1.] F a man possessed of a lease for years as executor of J. D. agrees, for a good consideration, to convey it to J. S. and after, before it is done, dies intestate, and after J. N. takes letters of administration of the first testator, he is not bound in equity to convey it according to the agreement of the executor, although the executor, during his time, had power to dispose of it at his pleasure; because the administrator comes paramount to this agreement, and is to dispose of it for the soul, and for the payment of the debts of the first testator. Pasch. 13 Car. in chancery, between Sir GAMALIEL CAPEL, defendant at the suit of Sir ROBERT WISEMAN, decreed by the lord-keeper, he having the opinion of Justice Jones, Barkly, and Crawly, in the same case, as he said, their opinions being accordingly.]

If a jointenant agrees to alien, and does it not, but dies, it would be a strange decree to compel the survivor to perform the agreement;

per cur. 2 Vern. 63. pl. 56. Pasch. 1688.

[2. So if there be two jointenants of a lease for years, and one agrees to assign his moiety, and dies before it is done, this agreement shall not, in equity, bind the survivor, because he comes paramount the agreement. Pasch. 13 Car. in chancery, in the said case of WISEMAN, agreed by the lord-keeper, and he said, that it was also the opinion of 3 judges; and he said also, that so was their opinion, that if the baron be possessed of a term in the right of his wife, and agrees to assign it to another, and dies before it is done, this shall not in equity bind the feme.]

[3. If the father, being seised in fee of land, and being indebted to several creditors, mortgages this land to J. S. for money paid upon condition of redemption, and after it is forfeited to the mortgagee for non-payment at the day, and then the father dies, and after the son and heir of the father, who is liable to the debts of the creditors, joins with the mortgagee in a conveyance to another purchaser, and this is made for money also given to the heir, yet the creditors of the father shall not have any remedy in equity against the son for the money by him received, for his joining in the assurance, because in law he had no power of the estate. M. 15 Car. B. R. resolved in chancery by the lord-keeper, Justice Jones and Berkly, as it was said by Justice Jones and Berkly.]

4. A copyholder for life, where there was a widow's estate by custom, agrees to sell his estate, and enters into bond, that the purchaser should enjoy. The bill was brought by the purchaser against the widow, to bind her by this agreement, but the court dismissed the bill, with costs; for if such contracts for copyholds should be decreed, all lords would be defrauded of their fines, &c. 2 Vern. 63. pl. 56. Pasch. 1688. Musgrave v. Dashwood.

(X) In what Cases one may sue in a Court of Equity, where he hath Remedy at Common Law.

See tit. Plea and Demurrer (H)—
See tit. Demurrer.

[1.] If a man, for a good consideration, promises to another to make to him a lease of certain land, and does not perform it, he shall not sue upon this promise in a court of equity, because he may have an action upon the case at common law, although in this he shall recover damages (*) only, and not the lease itself, whereas in a court of equity he should be compelled to make the estate according to the promise. Pasch. 14 Jac. B. R. between BROMAGE AND JENNYNG resolved, and prohibition granted accordingly to the marches of Wales.]

Roll. Rep. 368. pl. 22. S. C. and it being urged

* Fol. 381.

that this was usually done in chancery, Coke, Dodderidge, and

Haughton replied, that without doubt a court of equity ought not to do so, for then to what purpose † is the action upon the case and covenant? and Coke said, that this will subvert the intent of the covenantor, when he intends to have it at his election, either to lose the damages, or to make the lease, whereas here they would compel him to make the lease against his will; and so it is if a man be bound in a bond to indent another, he cannot be compelled to make a feoffment; and by Dodderidge, if a decree be made that he should make a lease, and he will not do it, there is no other remedy but to imprison his body, and the serjeant who moved it, confessed that he did it against his conscience by reason of the use, and a prohibition was granted accordingly.——So where a like suit was in the court of requests, and it was urged that it is the ordinary course in a court of equity; but Jones J. said, that though it be so in the court of chancery, yet it shall not be suffered in the court of requests. Lat. 172. Mich. 2 Car. Molineux's case.

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[2. If B. sues D. in the court of marches of Wales by English bill, for that whereas A. leased to B. certain lands for years reserving rent; the lessee entered into an obligation of 100l. for the payment of the rent during the lease; and after B. assigned the term to D. who promised B. to save him harmless from the said obligation of 100l. against A. and to pay the future rent as it should become due, a prohibition lies, because in this case nothing is to be recovered but only damages; so that this is merely but an action upon the case, and the said court cannot hold plea by English bill in actions upon the case where the damages exceed 50l. P. 11 Car. B. R. between BLUNT AND HEMING, per curiam, a prohibition granted.]

[3. If a conveyance of land be made with a power of revocation, and a question is made in chancery upon a suit there, whether there was a revocation or not; this shall not be tried there, but ought to be dismissed to be tried at common law. Hob. Reports, 274. between MANWERING & DENNIS resolved.]

Hob. 202, 203. pl. 255. S. C. and says it was resolved by Ld. K. Bacon, and the matter of the rolls and Ld. Hobart himself, that this cause was not fit for chancery but for the common law, unless all causes that were triable naturally by the common law, and by jury, should be made examinable

examinable and determinable in chancery per testes, which were to confound jurisdictions and make common law and all the course thereof needless, and a handmaid to chancery; and so at length the cause was absolutely dismissed.

4. Subpœna in chancery by W. & B. *to answer of certain goods and chattels to the value, &c. which J. B. forfeited to the king, by reason that he was attainted of treason, and which came to the hands of the defendant, and which the king gave to the plaintiff by his letters patents, &c.* and the defendant demanded judgment of the subpœna; *for the plaintiff may upon this matter have detinue at the common law, and then he shall not sue in chancery by subpœna; for subpœna does not lie but where he has no remedy at the common law, and then when the common law fails, he shall have subpœna in chancery; and per cur. the subpœna lies well, by which the defendant was commanded to make inventory of all the goods which he had of the said J. B. by the next day, or else he should be committed to the Fleet.* Br. Conscience, pl. 6. cites 39 H. 6. 26.

5. A. made a deed of *feoffment* to his own use to B. but gave *no livery* of seisin. A. dies. C. his heir brings a subpœna against B. but by Morton, master of the rolls, C. was denied help here, because B. had nothing in the land; and *if he abate*, there is remedy at common law against him. Cary's Rep. 21. cites 18 Ed. 4. 13.

6. In *trespass* in B. R. the defendant was found guilty to the damage of 20 l. and the defendant obtained *injunction* in the chancery to the plaintiff, *that he should not proceed to the judgment subpœna 100 l.* Hussy and Fairfax justices said, if you pray judgment, we will give judgment; and where the party is *injoined*, his attorney may pray judgment, and if the attorney be *injoined*, then the party may pray it, and 100 l. is *not leviable by the law*, and as to the imprisonment in the Fleet, if the chancellor puts you there, then we at your complaint will send for you by *habeas corpus*, and deliver you. Br. Conscience, pl. 16. cites 22 E. 4. 37.

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7. The defendant refused to answer the *receipt of rent* and demurred, for that the plaintiff may have remedy by law for the same; therefore ordered a subpœna to be awarded to make direct answer. Cary's Rep. 101. cites 20 Eliz. Dixe and Cantrell v. Lintoft.

8. Upon the hearing of the cause, it appeared, that the suit was to be relieved of a *promise* made by the defendant to the plaintiff, *to surrender a lease upon payment of 100 marks* by the plaintiff unto him, and for that the matter is meet for the common law, therefore dismissed. Cary's Rep. 135. cites 22 Eliz. Greivill v. Bowker.

9. When any *title of freehold, or other matter determinable by the common law, comes incidently in question* in this court, the same cannot be decided in chancery, but ought to be referred to the trial of the common law, where the party grieved may be relieved by error, attain, or by action of higher nature. 4 Inst. 85.

Bull. 276.
cites S. C.
accordingly.

10. In a suit in the *marches of Wales, the question was, whether by a proviso in an indenture to lead the uses of a fine to make leases for*

21 years, or 3 lives, a lease made was pursuant to that power; and a prohibition was granted, because this is a matter determinable at common law, and that court ought not to intermeddle with it. Cro. C. 347. pl. 15. Pasch. 12 Jac. B. R. Fox v. Prickwood.

—But the court of chancery will determine such point. See Chan. Cases,

27 Hill. 14 & 15 Car. 2. The Lord Marquis of Antrim v. the Duke of Buckingham. 2 Freem. Rep. 168. pl. 214. S. C. in totidem verbis.

11. A thing which may be tried by a jury at common law, is not triable in chancery; for in the first case, if they give not their verdict according to their evidence, an attaint lieth; but in the other there is no remedy. Mar. 93. pl. 159. Hill. 16 Car. Anon.

12. Bill for an account of money collected by authority of commissioners of sewers dismissed; for the commissioners are to take the account, and not the chancery; per Finch K. Chan. Cases, 332. Trin. 22 Car. 2. Anon.

13. Bill by the heir to be relieved against a judgment against his ancestor. The judgment creditor pleads that he had brought a sci. fa. against the now plaintiff, who pleaded that he had no assets by descent, and therefore needs no relief of this court, and that this bill tends to the falsifying his plea at law to the said sci. fa. which plea the court allowed. Fin. Rep. 69. Hill. 25 Car. 2. Rives v. Richards.

14. It was objected that where a man has a title at law, he ought to pursue his legal remedy, and shall not have a decree in equity, but that is not always so, and the daily practice in this court in many cases is otherwise; as where a creditor by bond or the like, brings his bill for a discovery of assets, and having proved assets here, he shall have a decree for his debt, and not be put to prosecute at law for the same, and in many such like cases the court never sends the plaintiff to law where the title appears for him; Arg. Vern. R. 429. Hill. 1686. in case of the Earl of Kildare v. Sir Maurice Eustace.

15. Chancery never decreed a suit when it might decree a remedy, as in the case of a devise of land, or where a bond is taken in trust and the trustee refuses to let his name be made use of, the court will decree the duty and not an action to be brought in the trustee's name; Arg. Vern. R. 438. Hill. 1686. in case of the Earl of Kildare v. Sir Maurice Eustace.

16. Bill against executor for a debt due by defendant's testator, and secured by a bill of sale of goods; executor denied he knew or believed there was any such debt, and though the debt was proved in chancery, yet plaintiff was sent to law to recover his debt; but the bill retained till after the trial had, and if plaintiff recovered at law, then he might resort back for account of assets. 2 Vern. 192. pl. 174. Mich. 1690. Gorray v. Ustwick.

17. Aston stood engaged to A. by simple contract to pay him 10 l. for curing his son, &c. and A. brought a bill in chancery for this 10 l. suggesting that the agreement was not in writing, and that the witnesses who could prove it were either dead or beyond sea. The defendant

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defendant Aston pleaded that the agreement was made in the presence of W. R. now living in Holland, and traversed the rest of the suggestion; and this being over-ruled in chancery, Aston now moved for a prohibition, because this is no more than an indebitatus assumpsit at common law; and if this proceeding should be allowed, it would be to the subversion of the whole frame of the common law; besides, the granting a prohibition would prevent the clashing of jurisdictions, and there are several precedents in the Register of prohibitions, *ne sequatur sub suo periculo*. The court appointed to hear counsel on both sides, but the cause was agreed. 3 Salk., 82, 83. pl. 2. Pasch. 8 W. 3. Aston v. Adams.

18. If J. S. a *jointress* brings her bill to have an account of the real and personal estate of her late *husband*, and to have satisfaction thereout for a defect of value of her jointure-lands, which he had *covenanted to be and to continue of such value*; and the defendant insists that this is a covenant which *founds only in damages*, and properly determinable at law; though it be admitted that a court of equity cannot regularly *assess damages*, yet in this case a master in chancery may properly *inquire into the value and defect of the lands, and report it to the court*, which may decree such defect to be made good, or send it to be tried at law upon a *quantum damnificat*. Abr. Equ. Cases, 18. pl. 7. Mich. 1699. Hedges v. Everard.

19. Where a bill was brought for *dower inter al'* the bill was dismissed as to that, because she had her remedy at law. 3 Chan. Rep. 162. Pasch. 7 Ann. Wallis v. Everard.

20. Where one recovered in a *trover against a servant of the African company*, equity would not relieve, because the plaintiff in equity might at law have defended himself. Chan. Prec. 221. pl. 180. Trin. 1703. Langdon v. the African company.

21. *Breach of covenants* is triable at law; for a court of equity cannot settle damages. MS. Tab. March 17, 1719. Stafford v. the Mayor of London.

22. The master of the rolls said, he agreed that the court ought to be very tender how they help any defendant after a trial at law, in a matter where such defendant had an *opportunity to defend himself*; but yet it will in some cases, as if the plaintiff at law recovers a debt, and the defendant afterwards finds a receipt under the plaintiff's own hand for the very money in question. Here the plaintiff recovered by verdict against conscience, and though the receipt were in the defendant's own custody, yet not being then apprised of it, he seems intitled to the aid of equity, it being against conscience that the plaintiff should be twice paid. 2 Wms.'s Rep. 425, 426. Mich. 1727. in case of the Countess of Gainsborough v. Gifford.

23. So if the plaintiff's own book appeared to be crossed, and the money paid before the action brought. Ibid. 426.

(Y) At what Time a Man may be relieved there.
[After Judgment, &c.]

[1. IF a man brings an action of debt upon an obligation in B. and after the defendant exhibits a bill in a court of equity, shewing good matter of equity, and after the plaintiff recovers in bank, * and there by agreement of the parties, and mediation of the court according to the equity of the cause, the plaintiff takes a certain sum of the defendant in discharge of the debt, damages, and costs, if the defendant proceeds after in the court of equity to have relief there, a prohibition shall be granted, because the matter is now ended in an equitable course by the agreement of the defendant himself. A prohibition was granted to the council of the marches, between GRUBB AND OLIVER, in this place; and Trin. 15 Jac. B. R. a procedendo was prayed, and per curiam denied for the cause aforesaid.]

[2. A cause shall not be examined upon equity in the court of requests, chancery, or other court of equity, after judgment at the common law. Hill. 11 Jac. B. R. a prohibition granted. M. 12 Jac. B. R. GLANFIELD'S CASE, per curiam. M. 13 Jac. B. R. between DR. GOUGE AND WOOD. Pasch. 14 Jac. B. R. SKIPWITH'S CASE, a prohibition granted to the requests. Pasch. 7 Jac. B. adjudged, and a prohibition granted to the council of marches. M. 7 Jac. B. CURTEIS'S CASE, adjudged, and a prohibition granted to the council of York.]

After a judgment in B. R. for the plaintiff, in which the case was, that G. the plaintiff sold to C. the defendant a jewel of gold with a diamond,

affirming it to be a good diamond, whereas it was only a topaz, and so C. was deceived, it being sold to him for 360l: whereas it was worth but 20l. C. gave a bond to one H. for 600l. in trust for G. and G. brought an action in H.'s name, and had judgment by confession of C. but C. afterwards finding the cheat, preferred his bill in chancery, and brought a writ of error to reverse this judgment, but the judgment was affirmed; but afterwards, upon an hearing in chancery, it was decreed that G. take his jewel again, and 100l. and that G. should procure H. to release and acknowledge satisfaction; and for not performing this decree G. was imprisoned. But upon a habeas corpus brought in B. R. the court first let him to bail, and the next term discharged him; for that this decree and imprisonment, as Coke Ch. J. said, was against law, being after a judgment at the common law. Cro. J. 343. pl. 11. Pasch. 12 Jac. B. R. Courtney v. Glanvill. — Roll. Rep. 111. pl. 54. Glanfield v. Courtney, S. C. and G. was discharged by consent of the whole court. — 2 Bulst. 301. S. C. — Coke Ch. J. said, they would always protect the law of the land; and G. was bailed by the court of B. R. but was presently after his delivery taken again, and committed to the Fleet by the Ld. Chancellor, and afterwards was bailed again by B. R. — Mo. 838. pl. 1131. Glanvill's case, S. C. and that B. R. bailed G. a 2d time. — S. C. cited Mod. 60.

[3. If A. be the king's farmer of a warren, but the inheritance is in the king, and B. brings an action of trespass against A. in B. R. and has a verdict in point, and judgment accordingly that there is not any warren; it seems that this shall not bind the king, but that he may sue after in a court of equity; for this was but a personal action, and binds not the king at common law, and therefore he is at large, as if no such thing had been done. Contra M. 12 Jac. B. R. between WRIGHT AND FOWLER, per curiam.]

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[4. If



Roll. Rep.
53. pl. 23.
Hill. 12 Jac.
B. R. the
S. C. but

* Fol. 382.

S. P. does
not appear.
—*Ibid.* 252.
pl. 20. S. C.
resolved that
whole court.
per tot. cur.

[4. If *C. and F. bring a prohibition in B. R. against W.* and upon a demurrer there a *consultation is granted*, and after the king and the said *C. and F. sue in the dutchy-court, pretending matter of equity of discharge, and that the said W. claims the tithes by the patent of the king, which they pretend to be void*, a prohibition shall be granted, because this is after * judgment here in B. R. and also no matter of equity appears. M. 13 Jac. B. R. between COATES AND SIR HENRY WARNER, resolved, and a prohibition granted.]

no court of equity can meddle after a judgment, and the prohibition was granted by the whole court. — 3 Bullst. 120. Warner v. Suckerman and Coates, S. C. and a prohibition granted per tot. cur.

5. In *quare impedit* by an abbot the defendant confessed the action, by which judgment was given, et quod cesset executio till the covin be inquired. Br. Collusion, &c. pl. 1. cites 18 H. 8. 6.

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6. The defendant, notwithstanding an *injunction* delivered unto him, got a judgment upon an action of debt in the common pleas, and it was decreed upon the hearing of the cause, that the defendant shall, within 14 days next after the decree, resort to the record in the common pleas, whereupon the said judgment is entered, and thereto confess of record a full satisfaction of the said judgment. Cary's Rep. 64. cites 2 Eliz. fol. 126. Colverwell v. Bongey.

No relief
after judgment. Toth.
266. cites
Trin. 17
Jac. fol.
909. Huet v. Hurston.

7. Judgment and execution was had at law, the plaintiff preferred his bill to be relieved; but dismissed, and had no relief. Toth. 265. cites Farrington v. Wolwich, 12 El. fo. 118. Bolt v. Reynolds, the like 12 El. fo. 129.

It was said by the court, that when judgment is given in this court against another, and execution upon it, and the sheriff levies the money, the Ld. Keeper cannot order that the money shall stay in the sheriff's hands, or order that the plaintiff shall not call for it; for notwithstanding such order, he may call for it. Mar. 54. pl. 81. Mich. 15 Car. Anon.

8. Debt upon a single bill satisfied, and the bill not delivered was sued, and execution gotten, and yet retained in chancery, notwithstanding a motion to be dismissed, because after judgment and execution; for it was said the judgment and execution may stand, and this suit for that he formerly paid. Cary's Rep. 106. cites 21 & 22 Eliz. Owen v. Jones.

9. A bill to be relieved upon bond after judgment and execution, and because no material matter alleged for maintenance thereof, therefore dismissed. Cary's Rep. 108. cites 21 & 22 Eliz. Adams v. Doddefworth.

10. Executrix brought an *indebitatus assumpsit* against the defendant, as executor, upon a promise of his testator, and had a verdict and judgment in B. R. which was reversed for error in the exchequer-chamber, and afterwards the widow exhibited a bill in chancery, suggesting all this matter, and prayed to be relieved. The defendant demurred to the bill, but the demurrer was over-ruled, for the lord keeper made no difference, where the party comes into chancery either after the reversal, or before any suit commenced at law; and said, that by advice of all the judges, he had allowed

allowed bills for debts against executors without specialty, with an averment that they had assets, but said he would confer with the judges. Moor 556. pl. 755. Trin. 31 Eliz. Masters v. Burde & al'.

11. One Knight acknowledged a *statute* to the defendant and another, *not to alien or waste his land*, and afterwards leased it to the plaintiff, the statute being acknowledged in consideration of marriage, and now, by reason of the lease so made, the defendant, being the survivor, conusee extends the statute; yet ordered, in respect the lease is no waste, the conusee not to receive any benefit by the said statute. Toth. 275. cites 37 Eliz. li. A. fo. 655. Mathew v. West and others.

12. The queen granted a lease of lands to T. rendering rent, and for non-payment to be void; then she sold the reversion to Sir M. F. who, because the rent had been arrear several years before, though then paid, entered, and avoided the lease, it being adjudged a limitation, and void without office; and afterwards T. exhibited his bill in chancery, setting forth, that at the time of non-payment of rent, which was 9 Eliz. he sent it by his servant, who was robbed, which, when he knew, he paid it immediately the day after to the queen, who accepted thereof, and he continued the payment till 30 Eliz. when the reversion was sold to Sir M. F. and so prayed to be relieved. The defendant, Sir M., pleaded the proceedings against the plaintiff at common law, and the judgment obtained against him; and it was resolved by all the judges of England, that if the complainant had exhibited his bill before judgment was had against him at law, he might have been relieved, but now he came too late; therefore Sir M. F. who was committed for not performing the decree, being brought up by habeas corpus, was discharged; cited by Coke Ch. J. Cro. J. 344. as Mich. 39 & 40 Eliz. Sir Moile Finch v. Throgmorton.

See the treatise called, The Jurisdiction of the Court of Chancery vindicated, published at the end of Chan. Rep. fol. 78. &c. where this case is commented upon.

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13. The defendant had execution and judgment upon two recognizances and a statute, amounting to 300l. but in respect it was a sleeping statute, the court ordered the obligor to be discharged out of execution, and the plaintiff's possession of the lands to be delivered. Toth. 267. cites 5 Jac. l. A. fo. 319. Gayner v. Lucas.

14. Judgment against the defendant in debt, upon the statute of 13 Eliz. against usury, and day given to move in arrest of judgment; in the mean time he exhibited his bill in chancery, and procured an injunction to stay judgment and execution, notwithstanding which, the court granted both; for the stat. 27 Ed. 3. cap. 1. and 4 H. 4. cap. 23. expressly enjoin, that after judgment given the parties ought to be quiet, and submit to it, and such judgment ought not to be avoided but by error or attain. Cro. J. 335. pl. 4. Hill. 11 Jac. B. R. Heath v. Ridley.

2 Bulst. 194. S. C. and Coke said, that it is much to be wondered, that no one would bring an information upon those statutes in such cases against

the party procuring such injunctions after judgment at common law; for be it in plea real or personal, after judgment given, the party ought to be quiet and to submit to it.

15. *Trespass* was brought in B. R. by a tenant of dutchy lands, and judgment against him. Afterwards he brought an English bill

in the dutchy court, whereupon B. R. granted a prohibition. And Coke Ch. J. said, that if any English court holds plea of a thing whereof judgment is given at common law, a prohibition lies upon the statutes of 27 E. 3. cap. 1. and 4 H. 4. cap. 23. Mo. 836. pl. 1129. Mich. 12 Jac. Wright's case.

16. A bill to be relieved upon an action of the case upon an *account*, after a verdict, judgment, and execution at law was referred again to law, because a verdict passed upon the oath of one Vintner, who was thought not to have dealt fairly at the trial, and after the cause referred to this court for equity. Toth. 87. cites Hill. 15 Car. Mallery v. Vintner.

17. It was agreed, that a court of equity cannot meddle with a cause after it hath received a lawful trial and judgment at the common law, *although the judgment be surreptitious*. Mar. 83. pl. 138. Pasch. 17 Car. B. R. Thompson v. Hollingsworth.

18. Plea and demurrer to a bill, it being after verdict, judgment and execution at law was allowed, though the action at law was for money won by gaming. Ch. R. 243. 15 Car. 2. Hunby v. Johnson.

So after verdict, judgment, and writ of error. Ch. R. 248. 16 Car. 2. Sewell v. Freeston. — Chan. Cases 65. S. C. the suggestion being of matters in defendant's cognizance, which plaintiff could not prove at the trial. — Bill has been allowed for matter discovered after the trial. Chan. Cases 65. cites Payton v. Humphreys.

For a matter delivered after the trial such a bill had been brought. 10. Bill after verdict in an action on the case, suggesting a matter in defendant's knowledge, which plaintiff could not prove at the trial. It was referred to precedents. 3 Ch. R. 17. Anon.

20. An action of *trover for bonds cancelled by defendant at law*, and now defendant at law brings a bill to be relieved after trial and judgment, because the penalties of some were recovered, and others were paid. Defendant here pleads the verdict and judgment, and the plea was allowed; and Bridgman K. confirmed the same, only ordered, that defendants must answer, whether they know what the jury gave their verdicts upon, whether the penalties or monies paid? and no further proceedings to be if they do not know and consent; but afterwards, Dec. 13, 1670, 22 Car. 2. it was ordered by Archer J. that the last order be discharged, and the plaintiffs may reply. 3 Ch. R. 54. 22 Car. 2. Rawlins v. Rawlins.

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21. After two verdicts in *ejectment*, whether the fines of copyholders were certain or arbitrary, the court would not relieve the plaintiff other than for the preservation of witnesses. 2 Ch. R. 76. 24 Car. 2. Smith v. Sallett.

22. A verdict at law as to the value of a portion given in marriage was pleaded and allowed. 2 Chan. Cases, 250. Hill. 30 & 31 Car. 2. Shuter v. Gilliard.

23. A verdict and other unjust proceedings in an inferior court were set aside, and the plaintiff in that court ordered to pay all the costs there and here. Fin. R. 472. Mich. 32 Car. 2. Vaux v. Shelly and Thompson.

24. After a recovery at law the defendant brings a bill, and suggests that money was paid in part of the goods, but *the receipts lost*, and therefore prays a discovery. The defendant here demurred, and it was allowed, because after a verdict. Vern. 176. Tr. 1683. Barbone v. Brent.

25. A bill was brought to be relieved against an apparent fraud; but after long debate was *dismissed*, and principally because the plaintiff did not apply to this court till after verdict and judgment. 2 Chan. Cases, 95. 98. Pasch. 34 Car. 2. Lee v. Boles.

26. Executor sent a letter to a creditor of the testator's, owning a mortgage to testator for 300 l. The creditor afterwards brought debt on bond against the executor, who directed his attorney to plead specially *riens ultra* to satisfy debts of a higher nature; but he by mistake pleaded generally *plene adm'*. The executor's letter, owning the mortgage for 300 l. was produced, on which *verdict* and *judgment pro quer.* The executor brings his bill, and proves that there were 2 prior mortgages on the same estate, which before were unknown to him, so that the mortgage to the testator *was worth nothing*, and was relieved, and injunction granted to stay proceedings at law, per the lords commissioners. 2 Vern. 146. Trin. 1690. Robinson v. Bell.

27. *Captain of a man of war* took the defendant's ship at sea, being an *interloper*, out of the limits of the East-India company's charter. She was condemned in the admiralty, and ship and goods delivered over to the king's use. The defendant, who was the owner and freighter of the ship, brought trover and recovered 1300 l. damages. The plaintiff brings a bill to be relieved against this judgment. The defendant pleaded the *judgment*, and the plea disallowed, and injunction till hearing, per lords commissioners. 2 Vern. 155. Trin. 1690. Tyrrell v. Beake..

28. Relief after judgment *in ejectment*, because of *fraud by construction* in the settlement in jointure engrossed by tenant in tail in remainder. Chan. Prec. 35. Mich. 1691. Raw v. Potts.

2 Vern. 239.
pl. 222.
Raw v.
Pole, S. C.
and affirmed
in Dom.
Proc.

29. A *bond pro easamento & favore*, if reduced to a judgment, is not avoidable at law, nor ever relievable here; per Ld. Wright. Chan. Prec. 290. Trin. 1702. in the case of Ive v. Ash.

30. A verdict in *trover* was directed to be given for the defendant, the *sale* of the goods to the plaintiff *being proved fraudulent*; but for *want of the defendant's proving a copy of the judgment*, by which he, as bailiff, took them in execution, the jury, by an after direction for that reason, only found for the plaintiff. On a bill by defendant at law, setting forth this matter, he was relieved, and the plaintiff at law decreed to pay costs, and a perpetual injunction granted against the judgment. Chan. Prec. 233. Trin. 1704. Kent v. Bridgman.

31. Bill to be relieved against a forfeiture for non-payment of rent, by a tenant at a rack-rent, after a *recovery in ejectment*. It was insisted for the defendant, that the rule for relief in equity against forfeitures of this kind did not extend to a *tenant at a rack-rent*, where the rent must be supposed

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equal to the value of the land, and therefore not in the nature of a penalty to avoid the lease at law upon non-payment of rent, by virtue of a clause of re-entry; that the rule extends only to beneficial leases where fines have been paid, or great sums laid out in improvements, &c. where the tenant is a sort of a purchaser of part of the interest in the term. In those and the like cases the clause of re-entry is in nature of a penalty, and therefore relievable in a court of equity, upon making satisfaction to the injured party, and payment of costs. Besides, the plaintiff here might have staid proceedings upon the ejectment, upon payment of the arrears of rent, and so might have been relieved at law, and therefore after trial and judgment ought not to have come here, when he might have had the same remedy at law. Per King C. I do not like giving relief here in these cases after a judgment at law; but the precedents are too strong for me; and decreed, upon payment of the rent and costs at law and in equity, the defendant to make a new lease for the remainder of the term to the plaintiff; but ordered a covenant to be inserted for the tenant to repair during the term, though no such covenant was in the former lease. MS. Rep. Mich. 12 Geo. in Canc. Taylor v. Knight.

(Z) Chancery and Courts of Equity. *Decree reviewed.* In what Cases it may be.

[1. IF in chancery a decree be against a statute, as the case was against the statute of wills, by which the common law is affirmed, that where the land is held in capite one third part shall be suffered to descend to his heir, and the father devises all for payment of debts, which is void for a third part, and the chancery confirms it for this third part by a decree, and this matter appears within the decree, this decree may be re-examined and reversed, because it is against the statute, and so the chancery errs in law. Tr. 15 Ja. in cancellaria, between ROSWELL AND EVERY, adjudged upon a demurrer, per Bacon the lord keeper; and after M. 16 Jac. the decree reversed accordingly by the advice of Justice Dodderidge and Justice Hutton, assistants to the court.]

* S. C. cited Arg. Lane 70. and see there the like point in the case of Arden v. Darcy, Trin. 7 Jac. in the exchequer.

[2. So if the chancellor errs in a decree in a matter of law, and it appears within the decree, as if the chancellor makes a decree upon the law upon his own opinion, against the opinion of the judges, this decree may be reviewed for this error in law. Trin. 15 Jac. in cancellaria, in SIR GEORGE REYNEL'S CASE, adjudged upon a demurrer by Bacon, the lord keeper. Tr. Jac. in camera scaccarii. Per curiam, this bill of review is in nature of a writ of error. * 27 H. 8. 15. there was a matter of law, and adjudged that it might be reversed there.]

[3. But

[3. But if the chancellor errs in his decree upon a matter in fact, this decree is final, and cannot be reviewed, because they cannot go to a new examination of witnesses now; for after publication this cannot be done. Tr. 15 Jac. in cancellaria, this was so held by the lord keeper in the said case. Tr. 8 Jac. between ARDEM AND DARCY, per curiam.]

* [4. So if the chancellor errs in his conscience upon a matter of fact proved before him, there may be a review upon this matter, because there needs no new examination; but this may be reviewed upon the old depositions, and this is usual.]

fact whereon the court gave judgment were mistaken, yet there is no ground of a bill of review, but the fact in this case must be admitted true, and the decree is matter of record, and can be tried only by the record; but in mistaking the fact, the proper course had been to have gotten the cause re-heard before the decree had been signed and inrolled. 2 Freem. Rep. 182. pl. 251. 16 June, 16 Car. 2. Combes v. Proud. — Chan. Cases, 54, 55. S. C. and in much the same words — Chan. Cases, 105, 106. Pasch. 20 Car. S. P. Haynes v. Harrison. — 2 Keb. 279. pl. 46. Mich. 19 Car. 2. Harrison v. Haynes, S. C. that by Ld. Keeper Bridgman, a decretal order not inrolled, cannot on allegation of matter of fact omitted be stayed, but the party must have a bill of review; but if matter of fact be omitted, this is cause to appeal to the house of lords.

On a bill of review the cause of review must arise and appear upon the case as stated in the decree, and the fact must be admitted as there stated, and that though the

5. No bill of review admitted on new matter. Cary's Rep. 82. cites 3 Jac. Lovegrace v. Webb.

Ibid. cites 15 Jac. Nugate v. Davis.

6. If a decree be made by commissioners upon the statute of 43 Eliz. cap. 4. of charitable uses, and exceptions put in against it in chancery, and there heard, examined, and confirmed in part, and altered in part, it was resolved that it cannot upon a bill of review be further examined; for it takes its authority by the act, which mentions but one examination, and is not to be resembled to the case where a decree is made by the chancellor by his ordinary authority. Cro. C. 40. pl. 2. Mich. 2 Car. between Windfor and the Inhabitants of Farnham.

Jo. 147. pl. 5. S. C. resolved accordingly, on a reference out of chancery.

7. After a decree made in point of right, any matter that might have been pleaded in abatement is not such an error as to ground a bill of review. N. Ch. R. 86. Lady Cranborne v. Dalmahoy.

Chan. Rep. 231. 14 Car. 2. S. C.

8. Confession subsequent to a decree is no ground for a bill of review, said to be a rule. Chan. Cases, 143. Hill. 15 & 16 Car. 2. in case of Curtes v. Smalridge.

2 Freem. Rep. 178. pl. 239. S. C. & S. P.

9. The want of any evidence or matter which might have been used in the first cause, and of which the party had then knowledge, is not any ground for a bill of review; Arg. and seems admitted. Chan. Cases, 43, 44. Hill. 15 & 16 Car. 2, in case of Curtes v. Smalridge.

2 Freem. Rep. 178. pl. 239. S. C. & S. P.

10. Where a bill is to be relieved on a fact not in issue, nor appearing in the former cause, a bill of review will not lie for it; Arg. Chan. Cases, 44. Hill. 15 & 16 Car. 2, in case of Read v. Hambey.

Bill of review does not lie, because nothing can appear to the

court on the body of this decree to alter it; Arg. 2 Freem. Rep. 179. pl. 242. S. C. Bills of review are allowed only on errors apparent in the record, or on new matter discovered since the decree. G. Equ. R. 184. Hill. 12 Geo. 1.

2 Chan.
Rep. 66.
S. C. the
plaintiff
would now
examine to a
matter of
tender and
refusal,

11. Bill of review was demurred to, because it *exhibited new matter*, whereas it was of defendant's knowledge at the time of the answer and hearing, though there was no proof then of it, but it came to light afterwards. *Ld. Keeper Bridgman* in effect dismissed the bill, but then gave time to search precedents. 3 Chan. Rep. 76, 77. Trin. 1672. *Chambers v. Greenhill*.
which he could not prove before the hearing, but now since the decree signed and inrolled he can prove it. The court ordered precedents to be searched, and precedents being now produced by the plaintiff, his lordship declared that they seemed of no weight to the plaintiff's purpose, and dismissed the bill of review.—3 Chan. Rep. 76. says, the case of *Colt v. Colt* was cited, where the defendant set forth deeds that made a title by answer, but were afterwards lost and a decree against them, but upon coming to light afterwards, the bill of review was admitted; but *Ld. keeper* said, this case was not like the other.—Vern. 417. arg. cites *Morgan's case*, where upon a bill of review, the plaintiff could not produce the deed, and so failed at the hearing of making out his equity, and though the deed came afterwards to his hands, which plainly made out the title, yet it was adjudged to be a right without a remedy, and the defendant to be without relief.

12. This difference was taken by the chancellor, where a *matter in fact* was particularly in issue before the former hearing, though you
[409] have *new proof* of that matter, upon that you shall never have a bill of review. But where a *new fact* is alleged, *that was not at the former hearing*, there it may be a ground for a bill of review. 2 Freem. Rep. 31. pl. 35. 1677. Anon.

13. The court would not make *error by construction*, and where a decree is capable of being executed by the ordinary process and forms of the court, and where things come to be in such a state and condition; after a decree made, an *original bill is requisite*, and a second decree upon that, before the first decree can be executed. In the first case, whatever the iniquity of the first decree be, yet till it be reversed, the court is bound to assist it with the utmost process the course of the court will bear; for in all this the conscience of the present judge is not concerned, because it is not his act, but rather his sufferance, that the act of his predecessor should have its due effect by ordinary forms; but where the common process of the court will not serve, but a new bill and a new decree is become necessary to have the execution of a former decree, which in itself is unjust, the court will not make it its own act by building on ill foundations, and charge his own conscience with promoting an apparent injustice. 2 Ch. Rep. 127. 29 Car. 2. *Lawrence v. Berney*.

14. On a bill of review, the party cannot *assign for error* that any of the matters decreed are contrary to the proofs in the cause, but must shew some *error in law* appearing in the body of the decree, or *new matter* discovered since the decree made, and that not without leave of the court. Vern. 166. pl. 158. Pasch. 1683. *Mellish v. Williams*.

15. When a decree comes to be reversed on a bill of review, it ought to be either, because it was *unjust in matter of law* arising within the body of the decree, or for that the court wanted or exceeded its *jurisdiction*; per North K. Vern. 292. in case of *Fitton v. E. of Macclesfield*.

16. Bill of review for that on account settled by the master, whose report was decreed; the master had *allowed interest upon interest*,
by

by jumbling principal and interest together, and then allowing interest for the first total; directed to be examined and rectified as to the point, but the rest of the decree to stand. 2 Chan. Cases, 153. Mich. 35 Car. 2. Ld. Ranelagh v. Thornhill.

17. Upon a bill of review no proofs are to be admitted, but such as were in the original cause. N. Ch. R. 196. 1691. Taylor v. Wood.

18. *Forgetfulness or negligence* of parties under no incapacity is no foundation for a bill of review. MS. Tab. Jan. 13, 1719. Ludlow v. Macartney.

19. Ought not to be brought but for *manifest errors appearing on the face of the decree, or for new matters arising since the decree*, of which no advantage could have been taken without leave of the court to bring such bill upon new matters discovered. MS. Tab. March 1, 1726. Ashton v. Smith.

20. After a decree for payment of a sum of money and a rent-charge out of a manor, and to charge the defendant with the rent and arrears, who was no party to the grant of the rent-charge, a bill of review will *not lay, for that the charge exceeds the value of the rent of the lands*; for the value is no new matter, and it was not excepted to in the former suit, and therefore now remedies; and it is like the case of an executor who cannot plead want of assets after the debt decreed. 3 Ch. R. 88. Trin. 1635. Countess of Suffolk v. Harding.

(Z. 2) Bill of Review. By and against whom. [410]

1. **B**ILL of review will *not lie* but against those who were parties in the original bill, as where C. mortgaged lands to A. in fee, and covenanted and gave bond to pay the money, but did not. A. died, leaving G.'s wife his heir at law. G. and his wife brought a bill against C. for the money, or if not paid, then to foreclose him, and it was decreed accordingly. C. upon discovering that A. had left an executor to whom A. had given the money, he brought a bill of review against G. and his wife before the time ordered for payment by the decree, setting forth this matter, and prayed the direction of the court to whom he should pay the money, and to have the bond delivered up. And this was all by an original bill, and not by a bill of review; the court held, that in this case a bill of review would not lie, because the executor was not party to the former bill. 3 Chan. Rep. 94. Hill. 1659. The Earl of Carlisle v. Goble & Ux', and other Executors of Andrews.

N. Ch. R. 52. S. C. in totidem verbis. — 2 Freeman. Rep. 148. pl. 193. Earl of Carlisle v. Globe, S. C. & S. P. accordingly, per cur. — Vern. R. 291. in case of Fitton v. Earl of Macclesfield, S. P. Arg.

2. Plaintiff has a decree, and afterwards brings a bill of review to have more allowed him; defendant demurred, and insisted that a review lies only for him against whom the decree or dismissal is; after a long debate the demurrer is over-ruled. Chan. Cases, 53. Pasch. 16 Car. 2. Glover v. Portington.

Nelf. Chan. Rep. 96. S. C. & S. P. and seems to be taken from Chan. Cases.

3. A bill of review lies *only for him against whom the decree or dismissal is.* 2 Freem. Rep. 183. pl. 252. 14 May, 16 Car. 2. Glover v. Portington & al'.

4. A *devisee cannot maintain* a bill of review, being not in privity to the testator against whom the decree was. Chan. Cases, 123. Hill. 20 & 21 Car. 2. Slingsby v. Hale.

5. A *parish is sued*, and 4 are named to defend. A decree is against them. Another *parishioner*, who is *no party or privy*, may have a bill of review, because he is *grieved* by the decree; per Ld. Chancellor. Chan. Cases, 272. Hill. 27 & 28 Car. 2. Brown v. Vermuden.

6. *Assignee* cannot in any case have a bill of review. Arg. Vern. 417. pl. 396, Mich, 1686. in the case of Barbone v. Searle.

(Z. 3) Bill of Review. On what Terms.

2 Freem.
Rep. 172.
pl. 225.
S. C. in te-
tidem verbiis.

1. A Decree was obtained for a great sum of money; a bill of review was brought and *new matter assigned*. The rule of court was pleaded, that the defendant ought first to pay the money before the bill should be brought into court. But upon giving *good security for the money*, the court dispensed with the rule. Chan. Cases, 42. Hill. 14 Car. 2. SAVIL v. DARREY; and says, the like case between BASTON AND BIRON, by order of the house of peers about 1662.

[411] 2. *per cur.* In a bill of review *all things are to be performed according to the former decree, that do not, extinguish the right*; otherwise the non-performance is a good plea in bar; as if writings are to be brought into court, or costs paid, but not to release the right, or make a conveyance, because that would de-
stroy the right. Not bringing in writings according to the decree sought to be reversed, nor giving security for the costs in the bill of review, was pleaded in the cause between OKEOVER & POOLE. 2 Freem. Rep. 88. pl. 97. Mich, 1683. Fitton v. Ld. Macclesfield.

3. Plaintiff was allowed to bring a bill of review *without paying the costs decreed in the original cause*, amounting to 150 l. and for which he (as was said) had been in execution near 20 years, upon making oath he was not worth 40 l. besides the matter in question, and besides a suit depending between the same parties to foreclose a mortgage, the debt being pretended to be over-paid. Vern. R. 264. pl. 259. Mich. 1684; Fitton v. the E. of Macclesfield.

4. Though an *order is made* by the lord keeper, for *dispensing with costs* on bringing a bill of review, yet *the same ought to be set forth in the bill of review*. Arg. Vern. 292. pl. 285. Hill. 1684. in case of Fitton v. Ld. Macclesfield.

5. The plaintiff was not allowed to bring a *bill of review* unless he performed the decree, or would swear he was unable to

do it, and would surrender himself to the Fleet to lie there till the matter on the bill of review was determined. Vern. 117. pl. 103. Hill. 34 & 35 Car. 2. Williams v. Mellish.

6. The original bill was brought to settle the boundaries of the plaintiff's manor, and upon the first hearing an issue was directed out to be tried at law, and there was a verdict for the plaintiff; upon the equity reserved, there was a final decree for quieting the plaintiff's possession, and that defendants should pay costs, &c. Defendant moved for leave to file a bill of review upon an affidavit by his solicitor, that certain new evidence was discovered, since the verdict and decree, in favour of the defendant; that this new matter now discovered was a sufficient ground for a bill of review, as well as any error apparent in the decree itself, &c. The question was, if the bishop shall have leave to file the bill of review before he has paid the costs decreed against him? It was insisted on by the counsel for Sir Henry Lyddall, that the party ought not to file a bill of review before he has performed the decree, and that this is constantly allowed for good cause of demurrer to a bill of review, and that payment of costs is part of the decree, which ought to be performed as well as any other part of it, and an old book of orders and rules of the court, printed in 1623, was produced, wherein there was a rule tempore Bacon C. and another in the year 1656, to the effect following, viz. *That no bill of review shall be allowed till after the decree performed in all parts, unless such performance would extinguish the party's right or title at law*, (as a conveyance of land, release, &c.) and also there must be leave of the court for filing such bill of review, &c. That a bill of review would be a suspension of the payment of the costs decreed, and that Sir Henry Lyddall would be kept out of his costs till the bill of review determined, and if the bishop (who is of a great age) should happen to die, Sir Henry would lose them quite, for he cannot revive the suit for costs only, &c. E contra it was said for the bishop, that the rules produced on the other side were obsolete, and had been out of use for several years in many particulars, and therefore were not to be taken as standing rules of the court; that for many years last past, bills of review have been brought, without leave of the court, upon motion or petition, and it was never insisted on as irregular; that in lieu thereof a deposit of 50 l. is left with the register upon filing the bill of review, so that it is plain these old rules have not been observed of late years. That soon after the restoration, the rules and orders of the court were revised and corrected by Clarendon C. and that these last are taken now to be the standing rules and orders of the court, as they are printed, and called Ordines Cancellariæ, and in that book there is no such order as they have insisted on the other side; that a bill of review is like a writ of error at law, which suspends the execution of the judgment. The costs decreed is not a duty, but a consequence only of a decree against the party; that if the decree be reversed, of consequence the costs are gone, and therefore ought to wait the event of the bill of review. Per Cowper C. I think the old orders that have been read

MS. Rep.
7 December,
4 Geo. Sir
Henry Lyd-
dal v. Bishop
of Durham.

are reasonable and just, and ought to be observed to prevent unconscionable delays by bills of review, which would be brought in all causes of consequence and value, if they might be filed without leave of the court, and before the decree performed; and I think *payment of costs ought to be performed rather than any other part of the decree*, especially in this case, where the new matter discovered was in the power of the party, and it was his fault and neglect it was not discovered sooner; so let the event of the bill of review be what it will, the other side ought to have costs, as in the like case of a new trial granted upon the like grounds. Where a sum of money is decreed, the money must be paid before a bill of review is filed, though it must be refunded if the decree be reversed upon the bill of review; but, in the present case, if the decree should be reversed, yet the costs ought not to be refunded, which makes it a much stronger case. I think the *party himself should make an affidavit that this new matter was discovered since the decree*, and that the affidavit of a solicitor is not sufficient; for the bishop himself, or some other agent of his, might be informed of this matter before, at least if the bishop, by reason of his age, high station and quality, may be excused from making an affidavit of the particular matters and facts, yet, at least, he should have an affidavit to corroborate that of his solicitor; but this *affidavit of the solicitor alone is not a sufficient ground for a bill of review*, and therefore the counsel for the bishop must take nothing by their motion; per Cowper C.

7. Upon every bill of review to reverse a decree, the plaintiff must deposit 50 l. with the register to answer costs of suit to the defendant. 2 Wms.'s Rep. 283. Trin. 1725. Anon.

8. If brought upon new matter, as upon a deed discovered by the plaintiff since the former decree, the plaintiff must have the leave of the court for filing such bill, though not necessary in the case above for reversing a decree for error appearing on the face thereof. Ibid. 284.

9. But in the principal case, the plaintiff having deposited the 50 l. and annexed an affidavit to the bill, that the deed on which the bill of review was founded came first to the plaintiff's knowledge after pronouncing the decree, the bill was allowed upon plaintiff's paying the costs of defendant's motion to dismiss the bill, because it was filed without the leave of the court. Ibid. 284. Anon.

10. No bill of review lies without paying the duty decreed. MS. Tab. Jan. 21, 1717, Bishop of Durham v. Lyddell.—March 1, 1726, Ashton v. Smith.

(Z. 4) Bill of Review. At what Time.

1. BILL of review was dismissed, for that it was a long time since the decree was made, and the plaintiff rested under it without any complaint. 2 Chan. Rep. 46. 22 Car. 2. E. of Castlehaven v. Underhill.

2. Appeal

2. *Appeal to the house of lords* from a decree in chancery, and on petition of the appellants to examine witnesses in the cause, it was rejected, and the petition *dismissed*, and now the appellants bring a bill of review; and it was decreed that the defendants should answer the bill of review, or demur on the errors therein, and the benefit of the order of dismissal in parliament saved to the defendants. Fin. Rep. 468. Mich. 32 Car. 2. Needler v. Kendall & Hallett.

3. A bill having been *taken pro confesso*, a bill of review was brought, and a *demurrer* having been put in to it, was *allowed*; and now a new bill of review being brought, the defendant *demurred*, and for cause shewed, that a bill of review lies not *after a bill of review*, and the demurrer was allowed. Vern. 135. pl. 124. Hill. 1682. Dunny v. Filmore.

2 Chan. Cases, 133. S. C. and the bill of review dismissed, because of the former bill, though there

was manifest error not only in the form of the court, but also in the right, viz. 2 heirs, having title as heirs, one of them plaintiff had a decree for the whole, whereas he had title only to a moiety; and Ld. Keeper North, who dismissed the bill, said, that there was no remedy but in parliament; and there is a note, that there was no answer to put in, but the bill taken *pro confesso*.—See tit. *Pro Confesso* (A) pl. 4. S. C.—Vern. 417. pl. 396. Arg. cites S. C. that upon a bill of review the court had decreed the whole estate to the plaintiff; and that though it appeared, even upon the face of the decree, that the plaintiff had a title but to one moiety only, yet it was there resolved, that no bill of review would lie upon a bill of review, and the defendant was left without remedy.—The first bill of review was dismissed, but not on the merits, and a 2d was allowed; but it was ordered not to proceed without performing the decree made on the original bill. Fin. Rep. 162. Mich. 26 Car. 2. Ruton v. Ayscough.

4. Though there is no limitation of time for bringing a bill of review, yet after a *long acquiescence* under a decree, chancery will not reverse it, but upon very apparent errors; per Ld. Keeper North. Vern. 287. pl. 285. Hill. 1684. Firton v. Earl of Macclesfield.

5. It was said by some at the bar, that a *fine and a non-claim* is a bar to a bill of review, if the party was not in prison, &c. Vern. 290. Hill. 1684. in the case of Fitton v. Earl Macclesfield.

6. A man cannot bring a bill of review *after a demurrer allowed to a former bill of review*; per Jefferies C. Vern. 441. pl. 413. Hill. 1686. Pitt v. the Earl of Arglais.

7. It was agreed by court and bar, that the course of the court is, before any bill of review is granted, the *former decree ought to be executed, if the cause of the bill of review be not such as extinguishes the whole right* and foundation of the decree, as a *release*; and that is a good plea in bar of a bill of review, that the former decree is not executed; and it was said, that though bills of review be in nature of a writ of error, yet it is not favoured in equity; for upon writ of error (and that only in some particular cases) one need only to give bail to pay principal and costs; but in bill of review the decree ought to be actually complied with; and besides there ought to be security for costs. But a case of PALMER v. DENBY was cited, where, in the case of an executor, it was granted without execution of the decree. 12 Mod. 343. Mich. 11 W. 3. in Canc.

See (Z. 4) (Z. 5.) Pleas to Bills of Review. And what may
pl. 5. 7. be assigned for Error.

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1. **T**HE defendant answered the bill of review, but so as that some matter in his answer would bring into examination some part of the decree, as it was signed and enrolled; on which answer, as to that part, there was a demurrer, because this would tend to perjury and infiniteness to re-examine things examined and decreed; of which opinion the court was; but as well the defendant's counsel as the court said, there could be no demurrer upon an answer in equity. Serjeant Glyn, for the plaintiff, said, he had known it. The court made an order, that there should be no examination of that which had been examined; and that was the rule. 2 Freem. Rep. 181. pl. 249. 23 June, 16 Car. 2. Williams v. Owen.

2. To a bill of review the defendant pleaded the former decree signed and enrolled, and that there was no error shewn in it, and the same matter was fully heard and examined, and settled, which now was endeavoured to be examined again, and the plea was allowed. Fin. R. 209. Pasch. 27 Car. 2. Evans v. Canning.

3. It was objected against the bill of review, that they had assigned errors collected from the proofs in the cause, that did not appear in the body of the decree. But the Ld. Keeper observed, that was occasioned by the ill way they had got of late in drawing up decrees in general, without particularly stating the matters of fact; and said, the plaintiff in a bill of review should not be concluded by it, unless the matter of fact were particularly stated in the decree. 1 Vern. 215. pl. 212. Hill. 1683. Bonham v. Newcomb.

2 Chan. Cases, 161, 162. Broad v. Broad, S. C. accordingly; and it is there said, arg. that the plaintiff in a bill of review cannot allege matter of fact contrary to what is stated in the decree to be proved.

4. A debate arose touching the stating of the matters of fact in a decree, and it was complained that the registers now drew up decrees in such a manner as that no bill of review could be brought; for they only recite the bill and answer, and then add, that upon the reading the proofs, and hearing what was alledged on either side, it was decreed so and so; and never mention what particular facts were allowed by the court to be sufficiently proved, and what not, that so upon a bill of review it might appear to the court what facts the decree was grounded on. The Ld. Keeper declared he would not allow of that way of drawing up decrees in general; but that the facts that were proved should be particularly so mentioned in the decree; otherwise if a bill of review was brought, those facts should be taken as not proved; for else a decree could never be reversed by a bill of review, but all erroneous decrees must be reversed upon appeals. 1 Vern. 214. pl. 211. Hill. 1683. Brend v. Brend.

5. No objection is to be made on a bill of review that is not assigned for error. MS. Tab. Jan. 8, 1717. Watkins v. Price.

6. Objection to a master's report cannot be assigned for error upon a bill of review. MS. Tab. 8 Jan. 1717. Watkins v. Price.

7. Matters

7. *Matters already settled, or which might have been put in issue in the original cause, shall never be drawn into examination upon a bill of review.* MS. Tab. Jan. 13, 1719. Ludlow v. Macartney.

8. Bill of review is usual upon *discovery of new evidence.* MS. Rep. Hill. Vac. 15 March 1734. S. S. Company v. Bumstead.

(Z. 6) Costs and Damages. In what Cases. On Bills of Review.

1. **T**HE defendant had a decree for money. The plaintiff by bill of review reversed this decree, and the money decreed to the plaintiff. Per cur. on search of precedents, the defendant shall not pay damage * for this money. 2 Freem. Rep. 181. pl. 247. 23 May, 16 Car. 2. Jackson v. Eyre.

3 Chan. Rep. 15, 16. S. C. directions were given to search for precedents whether

damages had been given on a bill of review, and no precedents were now produced, and it was confidently affirmed that there was no precedent of any costs or damages given on a bill of review, and compared it to a judgment in a writ of error, where the judgment is, that the party shall recover *quicquid amisit per judicium prædictum*, but no damages or costs; and in this case it was ruled that there should be none. — Nelf. Chan. Rep. 83. Jackson v. Digry, S. P. accordingly, in much the same words, and seems to be S. C.

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2. A bill of review was brought, and demurred to; and afterwards the counsel for the plaintiff in the bill of review moved the court to discharge the bill, as not being regularly filed, upon payment of costs out of the 50 l. deposited in court upon the filing thereof, and the same was granted by Lord C. Cowper. MS. Rep. Mich. 4 Geo. The Bishop of Durham v. Sir Henry Lyddal.

(A. a) Costs. [In what Cases in General. And How.]

[1. **T**HE plaintiff shall not recover any costs in chancery, though he recovers the thing for which he sues, as a deed, or such like, which is not recovered in damages.]

2. Where a feme is newly endowed in chancery, there she shall not recover damages; for those of the chancery do not give damages. Br. Damages, pl. 195. cites 42 Aff. 32. and 43 E. 3. 32.

3. Damages shall not be given to the defendant in chancery by statute, but only where the bill is found true or false, and not where the bill is found insufficient in matter; for this is out of the case of the statute. Br. Damages, pl. 163. cites 7 E. 4. 14. per cur.

4. Forasmuch as it is informed, the trial of the truth of the matter resteth altogether in the declaration of the defendant, it is therefore ordered, that the defendant shall be examined upon interrogatories to be administered by the plaintiff; upon whose examination, if

if the matter fall not out for the plaintiff, then the *plaintiff to pay the defendant's costs*, and the cause to be dismissed. Cary's Rep. 64. cites 2 Eliz. fol. 122. Fifield v. Vimore.

5. The plaintiff *at the day appointed for hearing appeared not*, therefore the defendant is dismissed with costs. Cary's Rep. 64. cites 2 Eliz. fol. 125. Fincham v. Backwood.

6. The defendant being *served with a process*, found the *cause set down for hearing*, and attended, and was dismissed with costs, because the *plaintiff was not ready*. Toth. 108, 109. cites 15 Eliz. Clayton v. Leigh.

7. The defendant is adjudged to pay to the plaintiffs 40s. costs, for suing out process of *contempt* against him, *being discharged by her majesty's general pardon*. Cary's Rep. 79. cites 18 & 19 Eliz. Jones and Paris v. Jones.

8. The plaintiff *showed the defendant a writ*; but did deliver him neither a note of the day of his appearance, neither did the same appear unto him by the schedule, label, or any other paper, and the defendant appearing found *no bill*. It is ordered the defendant be allowed good costs, and an attachment against the plaintiff for such serving. Cary's Rep. 83. cites 19 Eliz. Brightman v. Powtrel.

[416] 9. Costs to *witnesses served to testify*, having no charges tendered unto them, nor any interrogatories put in for them to be examined upon. Cary's Rep. 87, 88. cites 19 Eliz. Pearce & Ur' v. Crawthorne & White.

10. Costs *paid to a witness before he be examined*. Cary's Rep. 88. cites 19 Eliz. Belgrave v. the Earl of Hertford v. Drury.

11. Subpoena served at the *suit of an unknown man*, and *no bill in court*, the server to pay costs. Cary's Rep. 92. cites 19 Eliz.

12. The plaintiff was adjudged to pay the *defendant* 37s. 6d. costs, for that, he *being served* with a subpoena in Hillary term appeared, and by his answer *disclaimed*, and yet after the plaintiff served him with a subpoena to rejoin; but afterwards the same costs were discharged by motion, for that the *defendant had, before the costs, put in his rejoinder*; but, upon a disclaimer, no costs is to be allowed. Cary's Rep. 156. cites 21 Eliz. Read v. Hawsted, als. Lane.

13. The defendant was *taken upon a commission of rebellion* at the plaintiff's suit, and required his costs to be allowed him. The court asking the opinion of the clerks, it was agreed with one consent, that he should have his costs allowed; therefore ordered accordingly. Cary's Rep. 156. cites 21 Eliz. Morgan v. Ap John Gowge.

14. The plaintiff is adjudged to pay to the defendant 50s. costs for *prosecuting process of contempt* against him, and *no contempt proved*. Cary's Rep. 117. cites 21 & 22 Eliz. Wrayford v. Weight & Hingeston.

15. The *plaintiff, as sole executor to R. M. exhibited a bill against the defendants for the same matter, for which the plaintiff and D. G. as executors to the same M. exhibited another bill*, and ordered, that both bills should be referred; and if both for one cause, the defendants

defendants shall be dismissed from one of the bills with costs. Cary's Rep. 125. cites 21 & 22 Eliz. Maunder v. Wright and Allis.

16. A defendant *examined touching a contempt, and discharged* thereof, shall have costs of course, if a *commission* be not presently taken out to prove it, and if he prove it not, then *increase of costs*. Toth. 134. cites 37 Eliz. Atkinson v. Ailoff.

17. If a man *excepts against an answer*, and hath it referred, if thereupon it falls out to be *good*, the defendant shall have costs for that trouble upon motion. Toth. 149. cites Hill. 39 Eliz. Beswick v. Fox.

18. A bill was exhibited against an executor, to be relieved against a bond given by plaintiff to the testator. The court decreed for the plaintiff, and 140 l. costs were taxed. The defendant moved to have the costs discharged, because an executor is not liable to costs. It was insisted, that an executor, in all cases at law, where he is defendant, pays costs if the judgment is against him, as *de bonis testatoris si, &c.* But it was ruled, that an *executor, being defendant in equity, shall not pay costs*, because it is without precedent. Hard. 165. Hill. 1659. in the Exchequer. Twissleton v. Thelwell.

19. Where a man applies to be relieved against the penalty of a bond, and is ordered in chancery to pay interest and costs, it will *extend to costs at law as well as in chancery*. 3 Ch. R. 5. Hill. 14 Car. 2. Hall v. Higham.

20. No *damages or costs* were given on a *bill of review*, and it was said, there was no precedent of any, and compared it to a judgment in a writ of error, where the judgment is, that the party shall recover, *quicquid amisit per judicium prædict'*, but no damages or costs. 3 Ch. R. 15. 23 May, 16 Car. 2. Jackson v. Eyre.

2 Freem.
Rep. 181.
pl. 247.
S. C. ac-
cordingly.
—Nelf.
Chan. Rep.
83. Jackson
v. Digby,
S. C. ac-
cordingly.

21. *Subpæna* was served on defendant's servant, who gave no notice to defendant, who was prosecuted for contempt to a serjeant at arms; per cur. though the want of notice is sufficient to discharge the contempt, yet defendant shall pay plaintiff's costs, else plaintiff may be put to charge without any fault of his; for *prima facie* the service was good, and ground enough for plaintiff to go on with process of contempt, and so shall have his costs. Hard. 405. pl. 6. Pasch. 17 Car. 2. in Scacc. Duncomb v. Hide.

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23. Costs from their time of being taxed shall *carry interest*, and shall charge the assets by descent. 2 Chan. Rep. 247. 34 Car. 2. Lady Dacres v. Chute.

24. When a defendant has demurred, he may assign another cause of *demurrer at the bar*, paying costs, and if such demurrer is over-ruled, he ought, in strictness, to pay double costs; but when a defendant has pleaded, and there is no demurrer in court, he cannot demur at the bar, though he would pay costs. Vern. 78. pl. 72. Mich. 1682. Durdant v. Redman.

25. *Demurrer* allowed but without any costs, because it was a demurrer only, without any answer, and came in by *commission*; per North K. Vern. 282. pl. 279. Mich. 1684. Elme v. Shaw.

North K.
made a rule,
that for the
future a
master
should tax
defendant
his full
costs. Vern.
116. Anon.

26. Ld. Chancellor Jefferies declared, that he would not allow of the rule of dismissing a *bill* on 20 s. costs, but ordered, that for the future the defendant should have the costs, he should swear he was out of purse; but in such affidavit he must specify the particulars, that the court may judge of the reasonableness, if there should be occasion. Vern. 334. pl. 328. Mich. 1685.

27. One may add a new defendant without paying costs; so as such addition does not make the other defendants to change their answer. 12 Mod. 561. Mich. 13 W. 3. in Canc. Anon.

28. 4 & 5 Anna, cap. 16. s. 23. Gives defendant full costs where the bill is dismissed for want of prosecution.

29. Costs are not always to follow the event of a cause; as where the defendants claimed 800 l. to be due to them, and upon reference to the master, he reported 180 l. due, and no more, the court would not give the defendants costs, though the balance was in their favour, because they would have over-charged 620 l. and it being in the case of a charity, the plaintiffs were ordered their costs, because they had been serviceable to the charity, by easing them of the 620 l. debt which was claimed against them; and the court ordered the same to be paid out of the improved rents of the charity. Wms.'s Rep. 576, 577. Trin. 1717. Att. Gen. at the Relation of the Overseers of Islington v. the Brewers Company.

30. The heir at law, or heir male to the honour of a family, shall not pay costs if there be probable cause to contend for the family estate.—As where he found a deed by which a remainder vested in him, and not being privy to a revocation made thereof pursuant to a power reserved; it was not only lawful, but reasonable for him to make an enquiry by bill; per Ld. Ch. Parker. Wms.'s Rep. 482. Mich. 1718. Shales v. Sir John Barrington.

31. If a legatee or creditor not party to the cause, comes in before the master, he shall have his costs; for it was in his power to have brought a bill for his legacy or debt, which would have put the estate to farther charge; per Ld. C. Macclesfield. 2 Wms.'s Rep. 26. Trin. 1722. Maxwell v. Wettenhall.

32. If the plaintiff in an issue directed out of chancery, gives notice of trial, and does not countermand it in time, chancery on motion will give costs without putting the defendant to move the court at law where the issue is to be tried. 2 Wms.'s Rep. 68. Trin. 1722. Anon.

33. A bill was dismissed with costs, and the person, who was intitled to costs, died before they were taxed; there is no relief to be had in this case. Sel. Cases in Canc. in Ld. King's Time, 21. Trin. 11 Geo. 1. Anon.

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34. Decree was had by default, and a petition for re-hearing; the person in possession of the decree, did not attend at the re-hearing; bill dismissed with costs as to the petitioner. Sel. Cases in Ld. King's Time, 50. Mich. 11 Geo. 1. Wilson v. Dabbs.

35. On a bill by A. lord of the manor of D. against B. lord of the manor of S. to settle the boundaries of the manor of D. (the parties insisting upon different boundaries) it was ordered that they give

a note to each other of their boundaries, and the matter to be tried in a *feigned issue*, which being afterwards *found for the defendant on 3 several trials*, (the 2d having been certified by the judge to be against evidence,) and thereby the boundaries appeared to be as given in by the defendant. It was admitted that as to the costs of the 3 trials, the plaintiff must pay them; but his counsel urged that as to the costs here, the *bill was in nature of a bill of partition*, in which case neither side pay costs. But the master of the rolls, though he allowed the objection to have some weight, held, that as the *defendant had no bill here*; and the plaintiff might have tried the matter at law, and more especially since *no part of the issue is found for the plaintiff*, he should be within the common rule and pay costs throughout; and dismissed the bill with costs. 2 Wms.'s Rep. 376. Mich. 1726. Metcalf v. Beckwith.

36. Note, the course of the court is, that where a *cause is brought on upon a bill and answer*, and the plaintiff's *bill is dismissed* as against a defendant, there *only 40 s. costs* is to be paid by the plaintiff; *but if the plaintiff has a decree against the defendant*, though upon bill and answer only, there if the plaintiff has costs given him, it must be *costs to be taxed*. 2 Wms.'s Rep. 387. Mich. 1726. Anon.

37. A *witness examined on a commission deposed, reflecting words upon* for which he was ordered to pay costs; but upon a motion to discharge the order, Ld. C. King said, that he found the commissioners on both sides attended at the examination, and since it was their fault to take down any deposition that was scandalous or impertinent, he discharged the order. 2 Wms.'s Rep. 406. Hill. 1726. Anon.

But the reporter makes a quære, if the interrogatory had led to it, whether the counsel signing them it being the

would not have been liable to costs? But that it seems in the principal case it did not, it being the last general interrogatory. Ibid.

38. If an *answer be reported scandalous or impertinent*, the costs by the rule of the court are to lie upon the counsel; arg. and not denied. 2 Wms.'s Rep. 406. Anon.

39. If there be a *decree for costs*, and the *defendant dies before taxation*, the costs are lost; arg. and admitted on the other side, that if not ascertained on the death of the party, they are in some cases lost; but where they are to be looked upon *as a duty* and not as costs only, as where the suitor having paid the register his fee for making an entry, which he neglected, by means whereof the proceedings were irregular and the defendant obliged to pay 58 l. costs; the register must re-imburse the suitor, and though he dies before the costs ascertained, yet his executor shall be liable. For this was not a bare misbehaviour, but the receipt of the fee amounted by implication of law to a promise and agreement to procure an entry; and it was so held by Ld. C. King. 2 Wms.'s Rep. (657) Mich. 1731. James v. Philips.

(B. a) *How the Suit shall be prosecuted, [or rather in what Cases Inferior Courts of Equity, exceeding their Authority, shall be prohibited.]*

[1. UPON a suit in a court of equity, if the court will compel the defendant to stand to their award, a prohibition shall be granted, for this is against law; for if they have jurisdiction of the thing, they may compel him to perform it without an obligation. H. 13 Jac. B. R. BETWEEN ATKINSON & HOBBS, a prohibition granted to the council of York.]

S. P. Where a suit was exhibited in the court of

Fol. 383.

requests;
Arg. March
102. Trial.
17 Car.

C. B. and says, that by referring the merits of the cause, the others they would create courts of equity without number.

[2. If there be a suit before the council of the marches of Wales, and the cause is dismissed, but referred to certain persons to hear and determine it, and this is without the consent of the defendant; but thereupon the referees make an order, and certify it to the court, and for non-performance thereof the court (*) imprison him; a prohibition lies, for the court cannot make strangers judges in the case without the assent of the parties. M. 8 Car. B. R. BETWEEN MAYOW & MAYOW resolved, and a prohibition granted.]

(C. a) *Examination of Witnesses in Perpetuam rei Memoriam.*

[1. IF a man assumes to J. S. in consideration that he will marry his daughter, that he will pay him 500 l. after the death of J. D. in this case, because the witnesses are old, and J. D. is as young as J. S. so that the witnesses to prove the promise may die before J. D. and so J. S. shall be without remedy for his promise, he may exhibit his bill in chancery, and examine witnesses to prove it, in which he, that made the promise, may join in nature of an examination in perpetuam rei memoriam. M. 19 Jac. in chancery, BETWEEN SIR EDWARD TIRREL & SIR THOMAS CO.]

2. Witnesses were examined by commission before answer, in regard they were old. Cary's Rep. 67, 68. cites 2 Eliz. fol. 171. Sir Radmus Bagnold v. Green.

3. The plaintiff exhibited his bill to examine witnesses in perpetual memory touching a lease of lands, which he, and those by whom he claimeth have enjoyed 40 years; the defendant by answer claimeth the lands as copyhold of inheritance to S. who is owner of the inheritance, and within age; and therefore prayed that no witnesses might be examined till S. be of full age. And yet because the witnesses being old, and may die in the interim, therefore a subpoena is awarded against the defendant, to shew cause why a commission

commission should not be granted. Cary's Rep. 156, 157, cites 21 Eliz. Hearing v. Fisher.

4. A bill to examine witnesses in perpetual memory, touching common, not thought fit; *but a bill upon the title, and to examine, and publication thereupon, and then to go to law.* Toth. 80. cites 38 & 39 Eliz. Throckmorton v. Griffin.

* 5. A bill to examine witnesses in perpetual memory, concerning common, was retained. Toth. 85. cites 11 Car. Pott v. Scarborough.

6. Witnesses were examined to support an entail. Ch. Rep. 174. anno 1659. Cooper v. Tragonwell.

7. Witnesses were examined to prove a true deed of uses of a fine, whereby the lands were limited to the conusor and his wife for life, and after to the plaintiff their eldest son in tail, and to disprove a 2d deed of uses forged, limiting the remainder to the heirs of the survivor of the conusor and his wife. At the time of the fine levied J. S. had an estate for life in the lands, and is still living, but the conusor and his wife are dead. The conusor sold the lands, and made a title by the forged deed of uses. The purchaser demurred to the bill; but because the plaintiff could not try his title at law, the tenant for life being living, and that therefore this court is obliged in justice to preserve a title at law, which cannot at present be tried by reason of such impediment, the demurrer was over-ruled. Nels. Ch. Rep. 125, 126. anno 20 Car. 2. Seaborn v. Clifton.

A. and B. had each of them purchased a reversion expectant on the death of the tenant for life. A. brought a bill to examine his witnesses to preserve their testimony, and to be admitted to try his title in the

life-time of the tenant for life; but so far as B. a purchaser was a defendant, the court would do nothing in it, but dismissed the plaintiff's bill; and he lost his land for want of examining his witnesses. Cited per Ld. Rawlinson, Trin. 1690. Vern. 159. as the case of Seyborn v. Clifton.

8. Bill was to perpetuate the testimony of witnesses to prove a will and codicil. The defendants plead a *juris in the prerogative court*, concerning the validity of the said codicil, where that matter is proper to be determined. The court allowed the plea *quousque* it is determined in the spiritual court, whether the said codicil is to be proved or no, but without costs. Fin. Rep. 67. Hill. 25 Car. 2. Rogers v. Bromfield & al'.

9. The method is first to exhibit a bill in chancery, and therein to set forth a title and that the witnesses to prove it are old, and not likely to live, by which the plaintiff is in danger to lose it, and then to pray a commission to examine them, and a subpoena to the parties concerned to shew cause, if they can, to the contrary; and these depositions are not to be used against any other than the same defendants, or those claiming under them. See Fin. Rep. 391. Trin. 30 Car. 2. Mason v. Goodburne, in Marg.

10. Bill to bring a deed into court, and to perpetuate the testimony of witnesses, and decreed. Fin. Rep. 391. Trin. 30 Car. 2. Mason v. Goodburn & Fellowlove.

11. Bill by a commoner (against whom an action was brought at law by another commoner, and 10 l. damages recovered) to examine his witnesses to prove his right of common in perpetuum rei memoriam. Per cur. such bill is not to be admitted here; a commoner

S. P. Vern. 312. in pl. 308. One who is in possession of a commoner

piscary,
rent-charge,
&c. may
bring a bill
to examine

commoner ought not to come here to prove his right of common, till he has recovered at law in affirmance of his right. Vern. 308. Hill. 1684. Pawlett v. Ingrefs.

his witnesses in perpetuam, &c. though he has *not established his title at law*. But if one that is out of possession brings such bill, a demurrer will be good. But where the plaintiff suggested that the defendant threatened to disturb him, &c. when his witnesses should be dead, if the defendant not only threatened but actually did disturb by fishing, &c. daily, in such case the defendant should plead that he did daily disturb the plaintiff, and therefore the plaintiff should seek remedy at law; or if the plaintiff had shown in his bill that defendant had actually disturbed him, then the demurrer had been proper, but not for barely threatening. Chan. Prec. 531. Trin. 1720. The Duke of Dorset v. Serj. Girdler.

* Decreed per Ld. Keeper Wright. See Chan. Prec. 532. Winn. v. Hatty.

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12. On a bill to perpetuate the testimony of witnesses touching a right to a way, the plaintiff must set out the way exactly in his bill *per & trans* as he ought to do in a declaration at law. But by North Ld. Keeper, such trivial things as ways, rights of common or water-courses, shall not be examined into, or at least not till after a recovery at law; for the examination costs more than the value of the thing; and in the present case the plaintiff is either disturbed in his way, or he is not; if he be, he has his remedy at law; and if he be not, he has no reason to complain. But for the plaintiff it was said, that the bill charged that the plaintiff's tenant was in combination with the defendant, and would not suffer the plaintiff to bring an action in his name. Vern. 312. pl. 308. Hill. 1684. Gell v. Hayward.

13. If a bill be exhibited for the examining of witnesses in perpetuam rei memoriam, if the plaintiff therein prays relief, the bill shall be dismissed. 2 Vent. 366. Pasch. 36 Car. 2. in Canc. Anon.

Not any one
else, if he
be under no
impediment
of trying his
title at law.
Vern. 441.
pl. 415. Hill. 1686. Parry v. Rogers.

14. Devisee shall not examine witnesses in perpetuam rei memoriam, to prove a will against a purchaser without notice, till the will has been established by a verdict at law; per Ld. C. Jeffries. Vern. 354. pl. 350. Hill. 1 & 2 Jac. 2. Bechinall v. Arnold.

15. If witnesses are examined to perpetuate testimony, and afterwards a witness dies, yet the depositions shall not be evidence, but only between the parties to the suit. Arg. Carth. 80. Mich. 1 W. & M.

16. A bill was brought to discover a title to land, and for an account of the profits, and to perpetuate testimony, &c. The defendant answered as to the title, and demurred as to the perpetuating evidence, in regard the plaintiff might bring his ejectment and examine his witnesses at the trial. And upon affidavit that the plaintiff's witnesses were infirm, and unable to travel, the demurrer was over-ruled by the master of the rolls, and after by the lord chancellor on a re-hearing; but his lordship admitted, that without such an affidavit the demurrer would have been good, it being a common suggestion in a bill; but when sworn, if such demurrer should be allowed, it would introduce great inconvenience and hardships,

hardships, and a failure of justice. Wms.'s Rep. 117. Hill. 1709. Philips v. Carew.

17. It is a positive rule that where there is any *doubt on the proofs*, a *will* will not be established against an heir without a *trial at law*. 9 Mod. 90. Hill. 10 Geo. 1. Dawson v. Chater.

Ibid. cites
Ld. Moun-
tague's case
in the house
of lords fo

decreed, though he himself had proved the will in Doctors' Commons as to the personal estate.

(D. a) Bills in Chancery. For what they may be brought, and in what Cases they lie, in General.

1. **A** Bill was brought *for an account of a personal estate*, and decreed. 2 Ch. Cafes, 43. 32 & 33 Car. 2. Colston v. Gardner.

Account.
See tit. Ac-
count (D. a)
&c.

2. Chancery has *admiral jurisdiction* by the statute 31 H. 6. N. 66. or 68. which was never printed, and *letters of reprisal* may be *repealed* in chancery after a peace, notwithstanding the letters patents are, that no treaty of peace shall prejudice them. Vern. 54. pl. 51. Pasch. 1682. The King v. Carew.

Admiral ju-
risdiction.

* 3. Chancery cannot compel one to *execute a trust for an alien*; per Roll J. Sty. 21. Pasch. 23 Car. B. R. in case of the King v. Holland.

Alien.
* [422]

4. *Alimony* was decreed in chancery on a suit by the wife and her brother, against the husband, to be paid her for a year and an half. Chan. Rep. 44. 6 Car. 1. Lasbrook v. Tyler.

Alimony.
See tit. Ba-
ron & Feme.

5. Bill to be relieved against a *bail bond fraudulently assigned* by the sheriff. Vern. 87. pl. 76. Mich. 1682. Izrael v. Narbourn.

Bail bonds.

6. Chancery will not intermeddle with commissioners of *sewers accounts*; otherwise in case of receivers by authority in case of commissioners of *bankrupts*. Chan. Cafes, 232. Trin. 26 Car. 2. Anon.

Bankrupts.

7. One that *has been examined by commissioners of bankrupts*, may be examined, or put to answer to the *same matter* in canc. 2 Chan. Cafes, 73. Mich. 33 Car. 2. Perrat v. Ballard.

8. *Bankrupt or no bankrupt* is only triable at law, and so a bill was dismissed. 2 Chan. Cafes, 153. Mich. 35 Car. 2. Harding v. March.

9. Bill may be brought in chancery to foreclose mortgage of lands out of the jurisdiction of the court, (as of the *islands of Sark, Guernsey*, &c. which are governed by the laws of the dutchy of Normandy) if the person be here, or otherwise there might be a failure

Beyond sea.
2 Vern.
494. pl.
445. Pasch.

1705 Tol. failure of justice, and chancery *agit in personam & non in rem.*
 ler v. Car- 1 Salk. 404. 4 Ann. in Canc. Anon.
 terer, S. P. and seems to be S. C. and Ld. Keeper over-ruled the plea to the jurisdiction for the reason here
 given, and also, because the grant was of the whole island.

Boundaries.

* S. P. by
 the opinion
 of the
 judges.

Toth. 210.

cites the case of Egerton v. Egerton. — * S. P. Toth. 210. cites Pasch. 2 & 3 Car. Hobby v. Bonby. — S. P. Toth. 210. cites Pasch. 12 Car. Mr. Page's report of Hely v. the Earl of Suffolk.

10. The point being **parcel or no parcel* decreed, and being uncertain, the *lands lying intermixed*, ordered to be set out, notwithstanding the defendant, by general words, in a bargain and sale, have enjoyed the same long. Toth. 126, 127. cites 9 Jac. Dean of Windsor v. Kinnerley.

11. A suit to set out *boundaries*. Toth. 84. cites Mich. 2 Car. Tipping v. Chamberlain.

12. On a bill to settle boundaries between *freehold and borough English* lands, a commission was ordered to be directed to certain persons, as well to take the defendant's answer, as also to set forth the metes and bounds, and to return terrars and boundaries, which was done accordingly, and by consent of the parties the court decreed the boundaries, and that the same be ratified to all intents, as if the same had been judicially pronounced upon a full hearing in court. Nelf. Chan. Rep. 14. by Ld. Coventry, 7 Jac. 1. Spyer v. Spyer.

13. Decreed for *precincts* and parcels. Toth. 130. cites 8 Car. Mayor of Norwich v. Dean of Norwich.

14. Bill was brought for a commission to set out the boundaries of a *parcel of freehold land, of about 12 acres, suggested to be intermixed with copyhold lands*, and undivided, and *which defendant had recovered at law* as belonging to him, and that the metes and bounds of the said freehold lands were destroyed. The plaintiff offered to set out 12 acres of copyhold lands in lieu thereof, so as suits at law might be avoided, and he indemnified from a forfeiture to the lord of the manor. But it appearing by the defendant's answer, that the lands by him claimed and recovered are a distinct piece of ground, and inclosed, and known by the name of H. and not intermixed, a commission was denied. Fin. Rep. 17. Mich. 25 Car. 2. Davenport v. Bromley.

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15. *Four acres* of lands which the plaintiff had title to, being intermixed with lands of defendant *in a great field*, and which, by *ploughing and other means, were so destroyed, that they could not be distinguished* from the other lands of the defendant's, a commission was decreed to set out the metes and bounds of the said 4 acres. Fin. Rep. 96. Hill. 25 Car. 2. Boteler v. Spelman.

16. *Lands were leased for three lives* to the defendant's father, who had lands of his own contiguous. The *fences were afterwards thrown down, and boundaries destroyed*. The plaintiff (grandson of the lessor) brought his bill for a discovery thereof, and also of what was in arrear for rent, &c. and the court ordered defendant to answer as to the boundaries. Fin. Rep. 239. Mich. 27 Car. 2. Glynn v. Seawen.

17. A commission was decreed to set out boundaries, whereby 60 acres of *copyhold* might be distinguished from the freeholds of other persons. Fin. Rep. 162. Mich. 32 Car. 2. Wintle v. Carpenter.

18. Bill for *rents* purchased by the plaintiff of 2 s. and 3 s. per ann. suggesting constant payment time out of mind, but that they could not recover at law, not knowing the nature of the rent, whether rent-charge, service, or seck, and the boundaries of the land being uncertain, so could not declare at law so precisely as was required in an avowry; but defendant desiring the matter might be tried at law, an issue was directed to try if any and what rents were issuing out of all or any of the lands in the bill mentioned. Vern. 359. pl. 354. Hill. 1685. Cox v. Foley.

Where a rent-charge was granted to be issuing out of lands, but the lands charged lying intermixed with others, and the boundaries so confused

that the plaintiffs could not distrain, and therefore prayed relief by bill; a commission was ordered to set out the lands, and the same was returned and certified accordingly. Chan. Cases, 145, 146. cites it as a precedent produced to the court, as of 12 Car. 2. Bowman, alias Boreman, v. Yates. Same precedent cited as produced, Nelf. Cham. Rep. 121, 122, — S. P. mentioned Chan. Rep. 63. in 8 Car. 1. Harding v. Suffolk (Counts).

19. The plaintiff's and defendant's lands lying contiguous, the bill was to discover the boundaries of the defendant's estate, alleging the same fully appeared by the deeds and writings in his hands. The defendant demurred. 2 Vern. 38. pl. 34. Hill, 1688. Hungerford v. Goreing.

20. A gentlewoman took the death of her husband so heavily, that she said she would never marry again. Her son gave her 10 l. to pay 100 l. when she should marry; which she took. Afterwards she married. Decreed to repay the 10 l. only. Ow. 34. Trin. 31 Eliz. Anon.

Catching bargains.

2 Ch. Cases 241. Taylor v. Rudd, S. P. but

the demurrer was over-ruled, and defendant ordered to answer.

21. A widow gave a bond of 100 l. to B. on condition of her marrying again, and B. gave 100 l. bond payable to the widow's executors if she did not. The widow marries. Decreed the bond to be delivered up. 2 Vern. 215. pl. 197. Hill. 1690. Baker v. White.

22. A bill in equity will not lie to redeem a mortgage of chambers in an inn of court; but application must be made to the bench, and if not redressed there, then to the judges of the society; and the courts at Westminster have always declined meddling therein. And in the principal case the master of the rolls said he would not meddle with it; but the benchers themselves having recommended it to the plaintiffs to come hither, and left them at liberty to make this application, therefore he thought such bill proper, and decreed a redemption. 2 Wms.'s Rep. 511. Hill. 1728. Rakestraw v. Brewer.

Chambers in inn of court.

Upon this cause coming before the lord chancellor, he obliged them to shew that the benchers would not determine

the matter, but had given leave to go to law; and said that this regard ought to be had to all the societies of law, that all their disputes may be terminated among themselves; and that Ld. Keeper Wright refused to hear a cause of this nature, and sent it back to the benchers. In this case the court determined

determined the right, and ordered that the benchers should settle what was due for principal, interest, and costs, and to take accounts of the several receipts and allowances. Cases in Chancery in Ed. King's Time, 56. 11 Geo. S. C.

Collateral security.

23. Bill was dismissed where it was brought to be relieved on collateral security and supplementary. Chan. Cases, 301. Mich.

A vendor of lands takes

28 Car. 2. Barns v. Canning and Pigot.

a lease of them at a certain rent, with condition of re-entry, and given collateral security for the payment of the rent, and a power to re-enter. The rent was arrear, and a re-entry was made, and possessed the same several years. The vendor could have no relief against the collateral security, without paying the arrears of the rent due before the re-entry, as well as after, the lands sold being worth but 1601. a year, whereas they were sold as worth 2501. a year, and the lease taken was at that rent. Chan. Cases, 261. Trin. 27 Car. 2. Anon.

Conformity.

24. Bills of conformity have been long since exploded, and there is no such equity now in this court; per North Ld. Keeper. Vern. 153. pl. 142. Pasch. 35 Car. 2. in Alderman Backwell's case.

For a horn.

25. Bill was brought by the heir at law for a horn, by which the land was held; and North Ld. Keeper was of opinion the heir would be well intitled to the horn at law. Vern. 273. pl. 270. Mich. 1684. Pufey v. Pufey.

Jointress.

26. Bill was brought to have recompence on the eviction of a jointure, on the statute of 27 H. 8. 10. 2 Vern. 666. pl. 593. Mich. 1710. Countess of Derby v. Ld. Derby,

See tit. Jointress.

Jurisdiction special.

27. Where a matter is determined by a court erected by an act of parliament, and the matter was proper for their jurisdiction, chancery will not intermeddle. Fin. Rep. 319. Mich. 29 Car. 2. Combs v. Kingston.

28. On demurrer and plea to a bill to have an account of the profits of the Mendippe mines in Somersetshire, they plead a special act of parliament, which had given jurisdiction of all matters arising within the mines to the courts of *exclusive of all other jurisdictions.* Per Ld. Chancellor, the plea is not good, because although you plead an exclusive jurisdiction, yet you do not aver that there is any court of equity there. Vern. 58. pl. 55. Trin. 1682. Strode v. Little.

29. And this is not like the jurisdiction of the sewers, where this court cannot intermeddle, because there was a new jurisdiction created and reserved intire to itself; but here the jurisdiction of determining matters relating to these mines is transferred to the courts of *which are ancient courts,* in which by the common law this court did interpose in equitable matters. Vern. 59. pl. 55. Trin. 1682. Strode v. Little.

Law matters.

30. A bill, which was only preparatory to the bringing an action on the case, was demurred to and allowed. Toth. 72. Trin. 38 Eliz. Williams v. Nevil.

But to bring an action of trover it is common. Arg. Vern. 307. in case of the East-India Company v. Evans; and cited the printer's case in this court.

31. If A. disseises me of land, and builds a house on this land, I shall have a *judgment* for this, and he is not to go into chancery to be relieved for this; per Coke Ch. J. 3 Bulst. 116. Mich. 13 Jac. The King v. Dr. Goudge.

* 32. The court of chancery will not try or *ascertain damages recovered* at law in an action of covenant, but ordered the parties to law *on the covenant*. 2 Ch. R. 62. 23 Car. 2. Hooker v. Arthur.

33. In some cases even for a *trespass*, a bill is proper in this court, as where by the secret contrivance a man cannot easily prove it, as for instance, if a man in his own grounds digs a way under-ground to my mineral, &c. per North K. Vern. 130. pl. 114. Hill. 1682. in case of East India Company v. Sandys. But ordinarily it lies not to discover a trespass as to discover a trespass in lands or goods; Arg. 2 Chan. Cases, 66. in the stationer's case.

34. Where a man ran away with a casket of jewels, he was ordered to answer, and the parties own oath allowed as evidence in odium spoliatoris; cited per North K. Vern. 308. pl. 300. Hill. 1684. in case of the East India Company v. Evans & al'.

35. Bill to be *quieted in the possession of an ancient ferry used with a rope over the river Ware* in com. Durham, against 20 defendants, who had cut the rope, to avoid the multiplicity of actions, &c. Per Parker C. you may have *trespass* for cutting the rope; a ferry is in nature of an highway, and a bill does not lie to be quieted in the possession of an highway. It is true, a bill in chancery does lie to be quieted in the possession of common, &c. but that is of a different nature; this is a navigable river, and the rope to the ferry is an obstruction to the navigation; if the plaintiff has any such right, there is a proper remedy for him at law, and therefore bill dismissed with costs. MS. Rep. Pasch. 13 Ann. Hilton v. Lord Scarborough & al'.

36. The court will not retain a bill to examine point of *lunacy*. Toth. 227. cites 10 Jac. Bonner v. Thwaite.

Lunacy.

37. Bill to *discover several ancient customs of a manor*, and for a commission to examine witnesses to perpetuate their testimony; defendant demurred for want of parties, and that it was a matter examinable by a jury, and the customs not to be established in this court. Ordered to answer the customs and other matters charged in the bill, whereby to bring the same in issue, and leave was given to amend the bill and make *all the tenants parties* (such of them as will give them letters of attorney so to do) plaintiffs, and the rest of them defendants thereunto; but the benefit of the demurrer as to the establishing the customs in this court, was reserved to the hearing. Fin. R. 114. Hill. 25 Car. 2. Hudson, Fisher, & al', v. Fletcher.

Manors.

38. Bill by lord of a manor to *establish an usage* and custom ever since H. 8th's time, for the lord upon the presentment of 7 copyholders,

pyholders, and that agreed to be by the major part of the homage, *to inclose waste ground to build upon*, and upon rendering several court rolls and hearing all parties decreed to be established, and that the lord might grant leases and estates at pleasure, after such presentment and agreement. Fin. R. 263. Trin. 28 Car. 2. Lady Wentworth v. Clay, Jeffries, Hall, & aP.

39. Bill to be relieved *pro certo lata*, curia advisare vult. 2 Vern. 278. pl. 26. Mich. 1692. Chafin v. Gawden.

*Measures of
lands.*

40. It was decreed what was a *yard land*, and how to set the same out. Toth. 131. cites 12 Car.

41. Where the quantity of a *yard land* is not known, a commission shall issue to set out so much land as the commissioners shall think fit, upon common intendments. Toth. 186. cites Hill.

* [426] 14 Car. Bishop of Hereford v. Awberry.

Peace bills.

So if one
commoner
sues another
for oppress-
ing the
common, or
using it
where he ought not, and recovers a shilling or other small sum for damages; if another commoner sues likewise a bill, that the second plaintiff may accept the like damages for what is past, to prevent charges at law, is a bill of peace, and proper in this court. Vern. 308. pl. 302. Hill. 1684. Pawlett v. Ingress.

But where the same plaintiff has brought several *ej. fiments* against the same defendant for the same lands, and 5 or more verdicts have been given for the defendant; a bill of peace is not so proper in this case, one man being able to contend with another. G. Equ. R. 2. Earl of Bath v. Sueriwin. — 10 Mod. 1. Anon. seems to be S. C.

Perjury.

43. *Perjury* to be examined here, HALSE V. BROWN, *notwith- standing the cause was dismissed*. Toth. 222. cites 16 Eliz. fo. 401.

S. C. & S. P. 44. Defendant was ordered to answer a bill of perjury. Toth. 73. cites 19 Eliz. Phillips v. Benson.
and it was affirmed by the officers of the court, that by the order and custom of the court, he ought to be examined upon interrogatories. Cary's Rep. 97. 20 Eliz.

45. Whereas the plaintiff's bill against the defendant for *wilful perjury*, the defendant hath demurred, which this court alloweth not of. It is ordered that a subpoena be awarded to the defendant to answer, Cary's Rep. 90. cites 19 Eliz. Woodcock v. Woodcock.

46. 40 l. costs given for *perjury*. Toth. 222. cites Mound v. Culme, Mich. 14 Car.

*Quieting
possession.*

47. The plaintiff exhibited, thereby showing, that there is a question and *controversy between two* defendants, for the *reversion of a manor of Aldwell, which he holds for years by lease* made thereof to him by one Anthony Marmyon, and that he doth not know to which of them the rent and reversion is due, and therefore de- sires,

lives, that upon *payment of his rent into this court*, according to the covenants and articles of his lease, he may be discharged, and saved harmless from molestation, suit, and trouble, for the same rents, by the defendants, or either of them; wherefore it is ordered, that an *injunction* be awarded against the defendants *not to molest the plaintiff* for his said rent, during his said contention, so as the plaintiff pay his rent into this court. Cary's Rep. 65, 66. cites 2 Eliz. fol. 141. Alnete v. Bettam and Marmyon.

48. Where a man made title to a *rent-sock*, of which there was *no seisin*, nor for which he had any action at the common law, and prayed help here, it was denied, upon conference had by the Ld. Keeper with the judges. Cary's Rep. 7. cites Mich. 1596.

Rent-sock.

49. A bill may be brought *for solicitor's fees* if the business was done in this court, and so it may be, though done in another court, if it relates to another demand made by the plaintiff in this court; per North K. Vern. 203. pl. 198. Mich. 1683. Earl of Ranelagh v. Thornhill.

Solicitors.
See tit. Solicitors.

50. Where a *statute* is extended, it cannot be tried in an ejectment *whether it be satisfied or not*, but the only remedy is by scire facias ad computandum, or bill in canc. but otherwise it is on an *elegit*; for there the debt and yearly value appear on record, and it may well be known when the debt is paid, and may come in evidence on a trial in an ejectment. Arg. Vern. 50. Pasch. 1682. in case of the Earl of Huntington v. Greenville.

Statutes, judgments, &c.

51. Bill for *relief against a bond and judgment*, which was decreed on plaintiff's paying what remained due, and interest, and costs at law, and then the bond to be delivered up, and satisfaction acknowledged, the plaintiff giving a release of errors; and, on failing so to do, the bill to be dismissed. Fin. R. 417. Hill. 31 Car. 2. Morrice v. Hollibarton and Pledger.

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52. Felling of *trees* is to be staid in equity, so far as that the pannage may not be taken away. Toth. 210. cites 36 Eliz. Corham's case.

Trees.
See tit. Trees.

53. Bill to *oblige defendant to accept a trust*, and proposing reasonable terms for the trustee, in case he would accept, which the trustee (the defendant) accepting, was decreed accordingly. Fin. R. 32. Mich. 25 Car. 2. Clifton & al' v. Sacheverell.

Trusts.
See tit. Trusts.

54. A bill to *compel trustees to enter to preserve contingent remainders* is of the first impression, for their title is merely at law; per King C. and says, it did not appear in the cause that the trustees refused to enter. 9 Mod. 132. Hill. 11 Geo. 1. Reeves v. Reeves.

55. A. differing with his mother about the repairs of the mansion-house, settles his estate on his brother, but first takes a bond of

Unnatural things.

of 500 l. penalty from him, in his sister's name, that he should never *suffer his mother to come into the house*. The bond was decreed to be delivered up and cancelled, it being against the law of nature to prohibit a son to cherish his mother. Vern. 413. pl. 391. Mich. 1686. *Traiton v. Traiton*.

*Wager of
law.*

56. There ought to be no more help in chancery than there is at common law, against him that hath *waged his law in debt*, though, peradventure, falsely. Cary's Rep. 7. cites 15 H. 7. *Duplege's case*.

Way.

57. An order for a commission to *set out meetways and causeways* moved in presence of Mr. Egerton, of counsel with the defendant. Cary's Rep. 107. cites 21 & 22 Eliz. All-Souls College v. Eyercall.

58. A bill to be relieved for a *way* which has been *abolished*, a commission to set it out. Toth. 85. cites 8 Jac. *Savill v. Timperly*.

59. A piece of ground *sold, but no reservation of a highway*, but decreed that a way should be continued as formerly. Toth. 133. cites Mich. 3 Car. *Powel v. Parsons*.

60. A *highway* decreed. Toth. 133. cites 10 Car. *Wootton v. Wootton*.

For more of this, see the several titles throughout this work.

(E. a) Relief. Against what Persons. The King.

• S. P.
Hard. 468.
Arg. in
Pawlett v.
Attorney-
General.

1. *G. Leased to S. and W. in trust for the wife and children of G. and after G. and W. are attainted of treason, &c. by this a moiety of the term vested in W. is forfeited to the king, and S. is tenant in common with the king. It was agreed, that the king shall not, in equity, be ordered to perform the trust, for as the king cannot be seised to an use, so his estate cannot be subject to a trust, and there is no equity against the king. Lane 54. Trin. 7 Jac. Wike's case.*

2. *Lands were mortgaged by P. to L. in fee, and entered into a statute and recognizance to pay the money at the day. The money was not paid at the day. L. dies. His son and heir is attainted of treason. The king seises. The executor of L. extends P.'s lands on the recognizance. P. by bill against the king and the executor, suggests that he could not pay the money at the day and place by reason of the plague, and that afterwards L. accepted the interest, and waived the forfeiture. The question on demurrer was, whether P. could have a redemption against the king? It was argued that he could not, but that he must prefer his petition of grace and favour. Hale Ch. B. said, he had declared his opinion in LORD CLEVELAND'S CASE, that in natural justice redemption of a mortgage lies against the king; but he said*

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said his opinion is; that the king cannot be compelled to reconvey, but that an *amoveas manum* only lies in this case. Baron Atkins was strongly of opinion that the party ought in this case to be relieved against the king, especially as he is the fountain of justice and equity, and the not doing it, would derogate from his honour. Hardr. 465. Trin. 19. Car. 2. in *scaccario*. Pawlett v. the Attorney-General.

(F. a) Bill. Joinder. Who may join, or be joined, in a Bill.

1. **I**F there be an agreement in a parish by a *vestry order*, that 100*l.* per ann. shall be paid to A. for a yearly lecture in the parish, in a bill for the recovery thereof, the court held, that all the parties to the order ought to be made defendants, otherways the plaintiff cannot have a decree. Hard. 333. Mich. 15 Car. 2. *Henchman v. Ayer*.

2. There was an English bill in the exchequer against *Harris*, to shew by what title he held such a meadow, which (as was alleged) appertained to the office of keeper of Gloucester castle granted to the plaintiff for life, and against the other defendants, as brewers of the city of Gloucester, every one of which, as the bill suggested, was by custom obliged to pay an annual sum to the said officer. To which bill the defendants demurred, because the bill is concerning things of several distinct natures, and is brought against several persons, which will occasion several answers and examinations; and if they were suffered to be put all into one bill, each party would be obliged to take copies of what no ways concerned his own cause, whereby the charge would be increased to no purpose; and of that opinion was the whole court. Hard. 337. pl. 7. Mich. 15 Car. 2. *Berk v. Harris & al'*.

3. As if a parson should prefer a bill against several persons, viz. against some for tithes, and against others for glebe, this is naught. Hard. 337. pl. 7. Mich. 15 Car. 2. in case of *Berke v. Harris & al'*.

4. But for tithes only it is well against several parishioners, because they are of the same nature. Hard. 337. pl. 7. Mich. 15 Car. 2. in case of *Berke v. Harris & al'*.

5. If a lord of a manor would prefer one bill against divers tenants for several distinct matters and causes, as common, waste, several piscary, &c. this were naught, though the ground and foundation of the suit, viz. the manor, be an entire thing. Hard. 337. pl. 7. Mich. 15 Car. 2. in case of *Berke v. Harris & al'*.

6. One tenant of a manor cannot bring a bill to quiet him in a customary right which is common to all the other tenants; for the end of such bills is, that, where several persons having the same right are disturbed, on application to the court, to prevent multiplicity of suits, issues will be directed, and one or two determinations will

will establish the right of all parties concerned on the foot of one common interest; but in all those bills either all parties joint, or a determinate number in the name of themselves, and the rest prefer a bill; whereas in this case one only * brings the bill on the general right, and not on the foot of any particular distinct right; and the bill was dismissed with costs. *Select Cases in Chancery in Ld. King's Time*, 74, 75. *Trin. 2 Geo. 2. Baker v. Rogers.*

(G. a) Abatement of Suits in Chancery. In what Cases, and by what.

1. Plaintiff exhibited his bill as well in his own name as in his wife's name, concerning a *promise* made by the defendants to the plaintiff and his wife to make them a lease of the manor of A. during their lives. The defendants demur, for that the plaintiff ought to have a bill of revivor against them; for that his wife is dead since the bill exhibited. The demurrer was disallowed; for the promise was made during the coverture, and the plaintiff claims not the same in right of his wife, therefore the defendants are ordered to answer directly to the bill. *Cary's Rep.* 88. cites 19 *Eliz.* *Thorne v. Brend, Wilkinson, &c.*

Cary's Rep.
140. cites
22 *Eliz.*
S. C. that
the defend-

ant was in possession at the time of the bill exhibited, and the plaintiff entered upon him. The defendant desired that either he might have an injunction for his possession, or else that the cause might be dismissed, which the court thought reasonable; and it is ordered that the plaintiff shall show cause why it should not be granted.

2. The plaintiff (pending the suit) conveys over his interest, but in trust, and yet the court would hold no longer in his name. *Toth.* 103, 104. cites 1584. *Hill v. Portman.*

3. Administrator in nature of a guardian to an infant, being executor, exhibits on his behalf a bill in chancery. The infant (depending the suit) comes of full age. This abates not the bill, by the opinion of the lord chancellor Egerton. *Cary's Rep.* 31. cites 7 Feb. 1602. 45 *Eliz.*

P. R. C.
pl. 1, 2.
S. P.

4. A feme sole, defendant, having a commission to examine witnesses, marries; and after the marriage the witnesses are examined on that commission, and held good, and the depositions ordered to stand. *Toth.* 163. cites 10 *Car.* *Winter v. Dancie.*

Chan. Rep.
231. 14
Car. 2. S. C.
and the
court, assist-
ed by the
judges, held
the demurrer
good, and
dismissed the
plaintiff's
bill of re.

5. A feme sole exhibited a bill, but before the hearing the cause she married, and afterwards the cause was decreed for her. On a bill of review to reverse the decree, this was assigned for error, for that the cause being abated by the marriage, there was no foundation for such decree. The defendant demurred, because it appeared not in the body of the decree, but quite dehors; nor was it proper for any but the defendant to take advantage of it, and it was matter of abatement only, and did not concern the right; and after a decree made in point of right, any matter that might be

be pleaded in abatement was not such error as to ground a bill of review upon; and the court was of that opinion, and allowed the demurrer. Nelf. Chan. Rep. 85. Cranborne (Viscountess) v. Delmahoy.

view. —
2 Freem.
Rep. 169.
pl. 219.
S. C. resolv-
ed accord-
ingly.

6. If a cause has slept 12 months in court, there shall be no proceedings had upon it without first serving a *subpœna ad faciendum attornatum*. Per Lord Keeper. Vern. 172. pl. 165. Trin. 35 Car. 2. Anon.

7. If the attorney-general of the dutchy-court exhibits an information in behalf of a part-owner of coal-mines, the relator's death abates the suit. Chan. Prec. 13. Trin. 1690. in case of Vermuden v. Heath. [430]

8. A feme covert was executrix, and a bill was brought against her baron and her for a legacy. They put in their answer, and witnesses are examined, and publication passes, and then the baron dies. The court held, that the death of the baron is no abatement in this case, and that the wife is bound by the answer and depositions; but in case of the wife's inheritance it might be otherwise. 2 Vern. 249. pl. 234. Mich. 1691. Shelberry v. Briggs.

9. Where a bill wants proper parties, it is discretionary in the court, either to dismiss the bill, or to give leave for an amendment, on payment of the costs of the day; but in the principal case, two lessees brought a bill, suggesting the third to be dead, whom they in abatement of a suit at law brought by defendants in this court as plaintiffs at law, afterwards swore to be living, the court thought, that if in any case a bill ought to be dismissed, it ought in this, and dismissed it accordingly, but without prejudice to another bill. Wms.'s Rep. 428, 429. Pasch. 1718. Stafford v. City of London.

10. Trustees were decreed to convey to certain uses, and it was referred to the master to settle the conveyance, after which the cestui que trust in fee dies; the master proceeded, and reported, that he approved such a draught of a conveyance. An exception was taken, that the suit abated by the death of cestui que trust, and that the master had no power to proceed till the suit was revived; but the court over-ruled the exception; for clearly, when there are several plaintiffs or defendants, the death of any of them made an abatement of the suit only as to themselves, and the suit continued as to the rest who were living; and therefore, as to the defendants, the trustees, they might well execute a conveyance of the legal estate, and were not to wait for any thing that was to be done by others. Abr. Equ. Cases, 2. Mich. 1727. Finch v. Ld. Winchelsea.

Wms.'s
Rep. 277. pl.
66. Finch
v. Ld. Win-
chelsea, is
not S. P.

11. It was said, that it was every day's practice to order money out of court to the party intitled by the decree, notwithstanding the death of some of the parties. Abr. Equ. Cases, 2. Mich. 1727. Finch v. Ld. Winchelsea.

12. The *death* of any of the parties, plaintiffs or defendants, abates the suit. P. R. C. 1.

13. So does the *marriage of a feme plaintiff*, but not of a *feme defendant*. P. R. C. 1.

(H. a) Bill of Revivor. Who may have it.

1. **T**HE plaintiff and her husband exhibited their bill against the defendant; the *husband dies*; the wife, now plaintiff exhibits a bill of revivor, and good. Cary's Rep. 100. 20 Eliz. *Alice Parrot v. Randall and Cowarden*.

2. An *assignee* cannot revive a suit. Toth. 272. cites *Hafelwood v. Reynolds*, in 23 & 24 Eliz.

3. An *executor* (his *testator dying after publication*) could not be permitted to exhibit a new bill to make further proofs, but was held to a bill of revivor. Toth. 272. cites *Ferney v. Lawne*, 30 Eliz.

[431] 4. Husband and wife joined in a bill for 200 l. arrears by year to her due; she *died before bearing*; he, after her death, exhibited a bill of revivor, and served process to hear judgment; yet, upon an objection that the defendant should first have been called to answer, the hearing was put off. 1591. Toth. 271, 272. *Cecil v. the Earl of Rutland*.

5. *Windham* being a widow, had a judicial order for the substance of the matter, and a commission to make proofs, and after she married the defendant, supposed it needed a revivor, and ruled not. Toth. 272. cites 37 Eliz.

6. If one exhibits a bill or information, and is not the party aggrieved, as an informer on a penal statute, or a misdemeanor, if he dies, it was ruled, that his heir, executor, or administrator, shall not have a bill of revivor, but the attorney general may. Noy 100. Mich. 43 & 44 Eliz. Anon.

7. R. H. made the plaintiff and his widow joint executors of his will, but upon this condition, that if his widow married, her executorship should cease, and then the plaintiff should be sole executor. A bill was exhibited by the executors, and an answer put to it, and several interlocutory orders made, and amongst the rest, an order by consent, to refer the whole matter in difference to the arbitration of another person. Then the widow died, and now the question was, whether there could be any further proceedings on this bill? or whether there must be a bill of revivor? And it being referred to Ch. J. Bridgman upon this point, he was of opinion, that there must be a bill of revivor. A bill of revivor was brought to revive all the former proceedings, and particularly that order made by consent, but disallowed as to this on demurrer. Nelf. Chan. Rep. 108. 18 Car. 2. *Hamden v. Brewer*.

8. A plaintiff who is a purchaser cannot maintain a bill of revivor. 2 Freem. Rep. 132. pl. 160. Hill. 21 & 22 Car. 2. *Bacchus's case*.

Chan. Cases
77. S. C.
but there it
is, that the
widow mar-
ried, and
held accord-
ingly.

9. B. being a *purchaser*, exhibited a bill of revivor against the defendant, and revived the suit by order, and the defendant joined in examining witnesses, and the cause coming to be heard, the bill was dismissed; for that the plaintiff, as purchaser, cannot maintain a bill of revivor, for that there wanted other parties at the hearing. 3 Chan. Rep. 39. Hill. 21 & 22 Car. 2. Backhouse v. Middleton.

As *devisee* cannot bring a bill of revivor, not being in representation to the devisor, but in nature of a purchaser.

Chan. Cases, 174. S. C. — See (O. a) pl. 1. Clare v. Wordell.

10. Where there are *several plaintiffs*, and the bill after hearing *abates*, some of them, without the rest, may revive the cause. 2 Chan. Cases, 80. Mich. 33 Car. 2. in a nota, in the case of Exton v. Turner.

11. Per cur. an *assignee* shall not have a *scire facias* to revive a decree that is not signed and inrolled; but *after the decree is inrolled*, an assignee may bring a *scire facias* to revive it, in like manner as at law, if there be judgment for an annuity, and the annuitant afterwards sells the annuity, the vendee shall have a *scire facias* upon this judgment. But though the lord keeper disallowed the *scire facias*, yet it was without costs, because the defendant might have demurred, but did not. Vern. 283. pl. 282. Mich. 1684. Dan v. Allen.

Vern. Reps 426. pl. 401. Hill. 1686. Dun v. Allen, S. C. says the *scire facias* was discharged by Ld. Keeper North, because the plaintiff not coming

In privy, was not intitled to such writ. And in this case it was insisted that the plaintiff ought to have brought an original bill to have a parallel decree made, in which it may be used as a good argument or inducement to the court to make a like decree, if no sufficient reasons are shewn to the contrary; but the master of the rolls now decreed, that the former decree should be confirmed, and reviewed, and executed. The reporter adds a quere.

12. *Administrator gets a decree and dies before inrolment*, or any further proceedings; *administrator de bonis non* may revive this decree * within the equity of 30 Car. 2. cap. 6. 2 Vern. 237. pl. 220. Mich. 1691. Owen v. Curfon.

Executor of an administrator cannot revive a decree obtained by the

administrator, but it ought to be brought by the administrator de bonis non of the intestate. G. Equ. Rep. 234. Arg. in case of Barnwell v. Ruffel.

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13. Mortgagor brings a bill to *redeem*, an *account* is decreed, and a report made, and divers proceedings thereon, and orders made for plaintiff to pay costs and deliver possession to the defendant. The mortgagee dies. *Executor of defendant* was allowed in *canc.* to revive the suit, and the proceedings confirmed in *dom. proc.* and the court thought the plaintiff *executor of that executor*, has the same right to revive upon the death of her husband, as he had on the death of his father. 2 Vern. R. 296. pl. 218. Trin. 1693. Lady Stowell v. Cole.

14. The *plaintiff's intestate* had obtained a decree against the defendant for *payment of a sum of money*, and also for *conveying of lands* and delivery of deeds; but before any thing was done upon it, died intestate; and the plaintiff having brought a *scire facias* to revive the decree, the *defendant demurs*, because the *heir was not made a party*, and a decree cannot be revived by parts; and if the heir will not join as plaintiff, he ought to have been made defendant.

2 Vern. 384. pl. 351. Mich. 17co. S. C. but S. P. does not appear.

defendant. On the other side it was said that the heir and administrator not are jointly concerned, and *each may prosecute pro interesse suo*, and cannot join; and if he had been made defendant, the decree would not have been revived against him, because the bill could only have prayed it might have been revived as to the personal estate; and the court over-ruled the demurrer, and said, it was like a judgment at law in waste, *where there may be 2 revivors*. It being then objected that the scire facias is to revive the whole decree, whereas it ought to be only as to the personality, the court *allowed the demurrer as to the reality*, but ordered the decree to be revived as to the personality. Mich. 1701. Abr. Equ. Cases, 3. Ferrars v. Cherry.

• S. P.
Wms.'s
Rep. 263.
per Lord
Harcourt.
Trin. 1714.
in Dones's case.

15. Where there is a *decree for an account, and defendant dies*, his representative may revive as well as the plaintiff, * both being in nature of plaintiffs. Chan. Prec. 107. pl. 158. Pasch. 1702. Kent v. Kent.

in Dones's case. — Ibid. 743. Arg. Mich. 1721. in Hollinhead's case.

16. If a *creditor is admitted by order to come in before the master and prove his debt*, and pay his contribution, he is intitled to revive, if the cause abates. Trin. 1702. Abr. Equ. Cases, 3. Pitt v. the Creditors of the Duke of Richmond.

March 13,
1722.
Wingfield v.
Whaley.

17. One who *claims only as heir at law by provision or by form-don*, cannot revive, but must bring his original bill. MS. Tab. May, 1721. Osbourne v. Uther.

18. *Bill of partition brought by several persons, one dies, who devises his part to a co-plaintiff, and makes him executor*; he brings a bill of revivor, to which it was demurred. It was said, that *bills of revivor, and bills in nature of bills of revivor, are very different*; a bill of revivor can only be by the heir as to the reality, and by an executor, or administrator, as to the personality. On bill of revivor, the estate continues the same as before abatement; but here, in case of a devisee who is a purchaser, the estate is altered, and a purchaser can never revive, and cites 1 Chan. Cases, 174. and an answer must be put in and publication pass, though possibly he may have benefit of orders, &c. The demurrer was allowed, but leave given to amend the bill, and revive as executor; and *an original bill, in nature of a bill of revivor as devisee, was thought the most proper method*. Sel. Chan. Cases in Ld. King's Time, 53, 54. Mich. 11 Geo. 1. 1725. Huet v. Ld. Say and Seal.

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19. It was held, that if *some of the plaintiffs refused to join in bringing a bill of revivor*, that the others may bring such bill, and *make those who refused defendants*. Abr. Equ. Cases, 2. Mich. 1727. in case of Finch v. Ld. Winchelsea.

20. And it was agreed that a *defendant might bring a bill of revivor as well as a plaintiff*. Abr. Equ. Cases, 2. Mich. 1727. in case of Finch v. Ld. Winchelsea.

21. Upon the late *statute relating to insolvent debtors*, it was resolved by the barons of the exchequer, that the *assignee of the insolvent*

solvent debtor is not enabled by this act to bring a bill of revivor as the debtor himself might have done, no more than an assignee under a statute of bankruptcy. M. 12 Geo. 2. Bowman v. Ridley & Harrison.

22. But it was agreed, that either might bring a bill in nature of a bill of revivor. And Parker B. said, that where it is *res integra*, he should very much doubt whether an assignee of a bankrupt, as in the present case of an insolvent debtor, might not bring such a bill, for he thought the words in the statute sufficient to enable him; but that the law was now settled. M. 12 Geo. 2. in case of Bowman v. Ridley & Harrison.

(I. a) Bill of Revivor. Against whom.

1. NOTICE given to a stranger of a bill of revivor is necessary, it is improper to make him a party not being in privy, and so they must lose the witnesses examined on the first bill. Chan. Cases, 152. Mich. 21 Car. 2. Style v. Bosville.

2. A decree and sequestration was had against A.—A. dies.—The decree being for a personal duty, ought not to be revived against the defendant as heir, and dismissed the bill, though it was for money payable on account of a charity. 2 Chan. Rep. 244. 34 Car. 2. University College in Oxford v. Foxcroft.

Vern. 166. pl. 157. S. C. Ld. Keeper inclined that it could not be revived against the

heir, but took time to consider of it, and would be attended with precedents.——Where a sequestration issues as mesne process, it determines by the death of the party; but where it issues after a decree, though for a personal duty only, it is otherwise. Vern. 58. pl. 54. Trin. 1682. Burdett v. Rockey.

3. A man marries an *administratrix*, Plaintiff gets a decree against him and her for 1000l. out of the estate of the intestate. She dies. Whether plaintiff could proceed against the husband without reviving and bringing an *administrator of the administratrix* before the court? 2 Vern. 195. pl. 177. Mich. 1690. Jackson v. Rawlins.

But the reporter says, it seems that the husband is not bound to answer it farther than the value of

the estate which he had with his wife.

4. A defective execution of agreement was decreed to be supplied, and in this case the legal estate was in A. and B. and the equity of the fee was in C. It was referred to the master to settle the conveyance; after which *cesty que trust in fee dies*. The master being attended afterwards by the plaintiffs, reported that he approved a draught of a conveyance, which was only from A. and B. in whom the legal estate was, to the use of the plaintiffs according to the decree. Per cur. this is well, notwithstanding the death of *cesty que trust*; but if the plaintiffs should hereafter desire a conveyance of the equitable interest, they must revive against the heirs at law of the *cesty que trust*; and so in all cases where any thing was required to be done by the representatives of the party dying. Abr. Equ. Cases, 2. Mich. 1727. in case of Finch v. Ld. Winchelsea.

(K. a) Bill of Revivor. How.

1. **I**N a bill of revivor upon a bill of revivor, there was a demurrer to it; and the question was, whether it would lie or not? And. 7 Rep. Kenne's case, and Robinson's case. 2 Rep. 186. being cited in point that it lies not, and divers precedents being cited out of chancery that it does lie; the court, in regard of the difficulty and consequence of the case, adjourned it till precedents were searched; but the chief baron seemed to be clearly of opinion that it lies, and that it is not like a bill of review, or an action per Journeys Accounts. Afterwards in Mich. term the court agreed that it well lies, upon reading two precedents in point in the court of chancery, especially in case of death, as here *2 several defendants died one after another; but if one be named defendant in the original bill who is yet alive, he ought not to be named in the bill of revivor, because the suit never abated as to him; but if he be named in the bill of revivor only, there he may be named in every bill of revivor afterwards, because he was not named a defendant in the original bill; sed adjournatur.* Hardr. 201. pl. 6. Mich. 13 Car. 2. in the exchequer. The Attorney-General v. Sir Edward Barkham.

2. A suit cannot be revived *in part*; but the whole proceeding, viz. bill, answer, &c. and all orders must stand revived. Arg. and agreed by the counsel of the other side. 2 Chan. Cases 80. Mich. 33 Car. 2. in case of Exton & al' v. Turner.

3. Notice given to a *stranger* of a bill of revivor is necessary. It is improper to make him a party, not being in privity; for if they go by original bill, they must lose the witnesses examined on the first bill. Chan. Cases, 152. Mich. 21 Car. 2. Style v. Bosville.

4. Adjudged that where the suit abates, the plaintiff may *either bring an original bill, or a bill of revivor, at his election.* Vern. 463. pl. 441. Trin. 3 Jac. 2. Spencer v. Wray.

(L. a) Bill of Revivor. In what Cases.

a Freem. Rep. 177. pl. 238. S.C. in totidem verbis, only the word (produced) is there, as it seems it should be, (* pronounced.)

1. **A** Decretal order was * produced in 1657, for several matters; and after the cause had depended upon account 3 years, a decree was drawn, wherein the first decretal order was recited; but part of the matter thereby decreed was omitted in the decretal part of the decree itself; and soon after the decree was signed and inrolled the defendant died. A *scire facias* was sued to revive, and in the prosecution thereupon, the plaintiff discovered the omission, and so could not have the benefit of that part which was omitted in the decree that way, and the defendant being dead could not help that omission by a motion upon the surprize. The bill now was a bill of

of revivor, to revive so much of the decree as was omitted as was alleged; howbeit in truth the bill was to the whole decree. It was pleaded that the decree being inrolled, a bill of revivor did not lie, but a scire facias. Ordered that the plea and demurrer be over-ruled. Chan. Cases, 37. Mich. 15 Car. 2. Williams v. Arthur.

* 2. Part of a decretal order, as it was signed and inrolled, was left out of the entering book in the register's office, which directed an allowance to the defendant; and in respect of the said omission in the order, the master made not such allowance; but upon exceptions to the report the allowance was made. 3 Chan. Rep. 72. Hill. 1671. Tredcroft v. White.

Fin. Rep.
36. Mich.
25 Car. 2.
S. C.

3. After a decree signed and inrolled the plaintiff brought a bill of revivor, the suit having abated; whereupon the defendant insists that the plaintiff ought not to have brought a bill of revivor in this case, but to have taken out a subpoena in the nature of a scire facias to revive the decree, the same being signed and inrolled in the life-time of the plaintiff's testator, therefore the defendant demurs to the said bill. The plaintiff insists that it is at the plaintiff's election to revive the said decree inrolled, and to have execution thereof by bill or subpoena in the nature of a scire facias; and as this case is, the whole proceedings could not be revived by subpoena, in regard several proceedings have been relating to costs since the decree, which proceedings can be only revived by bill, and therefore the most proper course was to revive all things by bill. This court held the said bill to be well brought, and held the demurrer insufficient. 2 Chan. Rep. 67. 24 Car. 2. Crofter v. Witter.

4. The plaintiff brought a bill against the defendant for an account, and after brought assumpsit at law for part of what was included in the bill, so was ordered to make election on which he would proceed. He elected going to law, and an injunction as to proceeding here. On the trial at law it appeared by the witnesses, that there were accounts between them. The counsel finding they had mistaken the action, never controverted the defendant's proof, but suffered a nonsuit; so the plaintiff moves for leave to revive, which was opposed by the defendant, the plaintiff having made his election. But the Ld. Chancellor gave leave to revive, and declared the only end of the injunction was that he should not proceed on both together; not that chusing one in which he miscarries, should preclude his right. It is not a favour, but ex debito justitiæ he might bring a new bill; and is it not of justice to make the coming at right as expeditious and as little expensive as possible? For on a new bill, after much time and money spent, you would be but where you are on a bill of revivor. The case of one COLLETT was quoted as a point. Sel. Chan. Cases in Ld. King's Time, 4. Mich. 11 Geo. 1. Hindford (Earl) v. Decosta.

5. Bill was dismissed with costs, which were taxed. A bill of revivor was brought singly for costs, to which it was demurred. In arguing the demurrer it was insisted, that though the constant rule

be that where a bill is dismissed with costs the party cannot revive for that, that must be taken to be where they are not taxed and liquidated to a sum certain; for then it becomes a duty; and though the bill be dismissed, it is not so much out of the court but the party, in consequence of such dismissal, is liable to the process of the court by subpoena, attachment, &c. The Ld. Chancellor said, it is a rule that, unless in account, where both parties are actors, they cannot revive; but he knew no instance of revivor in such a case as this, and said that it is very odd; but the rules of the court must be observed, and the demurrer was allowed. Sel. Chan. Cases in Ld. King's Time, 54, 55. Hill. 1725. 11 Geo. 1. Thorn v. Pitt.

[436] (M. a) Bill of Revivor. In what Cases. Where the Bill abates.

1. NO defendant, in case of *abatement* before the decree signed, can revive. 2 Chan. Rep. 193. 32 Car. 2. Glenham v. Statville.

2. Where there are *several plaintiffs*, and the bill after hearing *abates*, some of them without the rest may revive the cause. 2 Chan. Cases, 8. Mich. 33 Car. 2. in case of Exton v. Turner.

3. Where a *mutual account is decreed*, and there happens an *abatement*, the defendant in such case may revive, 2 Vern. 219. pl. 200. Hill. 1690. the Ld. Stowell v. Cole.

2 Vern. 297.
pl. 287.
Trin. 1693.
S.C. & S.P.

4. In an *injunction cause*, where it abates by the death of either the plaintiff or defendant, the rule is, that the court shall be moved to revive *within a stated time*, or else the injunction be dissolved. Select Cases in Chan, in Ld. King's Time, 24. Trin. 11 Geo. 1. Anon.

(N. a) Bill of Revivor. Necessary. In what Cases.

1. IT is ordered, that a subpoena be awarded against the defendant, to be examined upon interrogatories, whether before his answer he had knowledge that the plaintiff was married, and would take no advantage of the same marriage in his answer, then the matter to proceed without bill of revivor. Cary's Rep. 73, 74. cites 6 Eliz. fol. 150. Fairfield v. Greenfield.

2. The plaintiff exhibited his bill, as well in his own as in his wife's name, concerning a promise made by the defendant to the plaintiff and his wife, to make them a lease of the manor of Appelcourt, during their lives; the defendants demur, for that the plaintiff ought to have a bill of revivor against them, for that his wife is dead since the bill exhibited. Demurrer was disallowed, for that

that the promise was made during the coverture, and the plaintiff *claims not the same in right of his wife*; therefore the defendants are ordered to answer directly to the bill. Cary's Rep. 88, 89. cites 19 Eliz. Thorne v. Brend, Wilkinson, & al'.

3. A widow had a judicial order, and a commission to make proofs, and after she married; no bill of revivor needed. Toth. 228. cites Pasch. 37 Eliz.

4. Feme sole takes a commission to examine witnesses, and marries before the examination, and then they are examined. It was ordered, that the depositions should stand. Toth. 163, cites 10 Car. Winter v. Dancie.

5. Feme sole brings her bill, and marries, and gets a decree, without bringing bill of revivor; this will not impeach the decree, for it is only matter of abatement, and the defendant might have taken advantage of it before the hearing, but it is too late after. Ch. R. 231. 14 Car. 2. Cramburne v. Dalmahoy.

6. In a bill of revivor a defendant was omitted, but his name was used throughout the cause in motions, and a commission, and held, that this supplied the omission. Ch. R. 252. 16 Car. 2. Peachy v. Vintner.

7. Where husband and wife, in right of the wife, exhibited a bill, and the husband died, the wife, if she please, may proceed without a bill of revivor. 3 Ch. R. 40. Hill. 21 & 22 Car. 2. Parry v. Juxon. [437]

8. If jointenants, or tenants in common, exhibit a bill, and any of them die, pending the suit, there needs no revivor; per Ld. Keeper Bridgman. 3 Ch. R. 66. Trin. 1671. Wright v. Dorsett.

Abr. Equ. Cases, 1. pl. 5. S. C. adds a quere as to tenants in common,

because a right descends to their representatives.

9. It is not necessary to revive against a defendant that has not answered; per cur. Vern. 308. pl. 301. Hill. 1684. Oxburgh v. Fincham.

10. A cause having been heard on a bill of interpleader, and a trial at law directed to settle the right between the defendants, there is an end of the suit as to the plaintiff, so that if he afterwards dies, the cause shall still proceed, and there needs no revivor, each defendant being in the nature of a plaintiff; per cur. Vern. 351. pl. 347. Mich. 1685. Anon.

(O. a) Done on Bill of Revivor. What must, or may be.

1. A Devisee brings an original bill in the nature of a bill of revivor. The question was, whether the defendant should be at liberty to make a new defence? Ld. Keeper held, that where the bill, although original, is only to supply the want of privacy, and in all other matters but as a bill of revivor, I think the decree ought to be carried on in the same manner as it would have

On a bill in nature of a bill of revivor or against a devisee, the devisee cannot dispute the justice of

validity of
the decree,
for then a
devisee
would be in
better case
than an
heir; per
Ld. Keeper
Harcourt.

have been upon a bill of revivor, if the plaintiff had claimed in privity. There is no reason why the devisee should not have the same advantage of the decree as an heir or executor, without entering again into the merits of the cause, and the decree ought to be neither longer or shorter than the first decree. 2 Vern. 548, 549. pl. 499. Pasch. 1706. *Clare v. Wordell*,

2 Vern. 672. pl. 599. Pasch. 1711. *Minshull v. Ld. Mohun*.

In the end is
a N. B. that
the reason
seems to be,
because the
representa-
tive may
have a plea
to defend

him without denying the merits; for if an executor or administrator can truly plead *plene administravit* upon a *sci. fa.* at law (which must always issue in such case), the execution can only be *de bonis testatoris quando acciderint*; but the answer of the testator in a court of equity will bind the executor who has

2. *Defendant pleaded to a bill, but before the plea came on to be argued the defendant died.* The plaintiff revived, and upon the coming on of the plea to be argued, Ld. C. Talbot was of opinion, that it could not be argued, but that the *defendant's representative must plead de novo*. Cases in Chan. in Ld. Talbot's Time, 3. Mich. 1735. *Micklethwaite v. Calverly and Baker*.

(P. a) Pleas and Demurrers to Bills of Revivor.

Equ. Abr.
4. pl. 8.
cites S. C.
and adds a
quære.

* [438]

1. THE plaintiff has exhibited his bill of *revivor against 2, where the first bill was against 3*, and the *parsonage in question is named * by another name than in the former bill*; therefore ordered, if cause be not shewed by a day, the defendant shall be discharged. Cary's Rep. 78. cites 18 & 19 Eliz. *Heines v. Day*, Dean of Windsor, and Hatchines.

(Q. a) Costs. In what Cases on Bills of Revivor.

1. THE plaintiff exhibits his bill against L. and M. two of the defendants, and after commission M. marries J. B. the other defendant; and the plaintiff then exhibits a bill of revivor against the defendants, which needs not, as it seems to this court; therefore ordered, *if there be no cause of revivor*, that J. B. and his wife, who are called up by process to answer the same bill, are licensed to depart without answer to the bill of revivor, and the plaintiff to pay him such costs as this court shall award. Cary's Rep. 81. cites 19 Eliz. *Jackson & Ux. v. Smith, Bourne & Ux.*

N. Ch. R.
147. S. C.

2. A bill of revivor against one as heir of his father was dismissed with costs; he cannot have costs of the original suit; for they are dead with the person. 3 Chan. R. 65. 19 June 1671. *Loyd v. Powis*.

3. A decree was made, and before *costs taxed*, the plaintiff died, and a bill of revivor brought, and disallowed by lord chancellor

tellor on plea, that it does not lie for costs, 2 Chan. Cases, 7, Temple v. Rouse.

4. No revivor *for costs*, there being no *decree inrolled*. 2 Chan. Rep. 195. 32 Car. 2. Glenham v. Staville.

5. A suit cannot be revived *for costs alone*, where no duty is decreed; but when a duty is decreed, and costs awarded by the same decree, which is signed and enrolled in the life of the party, it is, otherwise, 2 Chan. Rep. 245, 246. 34 Car. 2. Lady Dacres v. Chute. 2 Chan. Cases, 104. but S. P. does not appear. Vern. 160. pl. 149.

S. C. but S. P. does not appear.

6. Feme sole exhibits her bill and then *marries*. Baron and feme bring bill of revivor, and obtain a decree with *costs*; per North K. this is not like a bill of revivor against an *heir* or *executor*, where the suit is *abated by death*; in that case they shall answer only for their own time, but here all proceedings stand in statu quo, and it is unreasonable there should be such an abatement; and in case the defendant had been a feme sole and intermarried, that should not have abated the plaintiff's suit, and in this case the abatement was by the parties own act. The court ordered costs of the whole suit, deducting only the charge of the bill of revivor, which was thought hard, because the abatement was by the parties own act, and because had the defendant been in the right and so intitled to costs, yet he could not have compelled the plaintiff to revive. Vern. R. 318. pl. 315. Pasch. 1685. Durbain v. Knight.

(R. a) Of Second and Supplemental Bills.

1. A Former bill depending, was pleaded in bar of a second, but though *both bills* were of the same matter and effect, the latter had some new matter. Ordered, that since the plea was good, the plaintiff should pay the usual costs of a plea allowed, but defendant to answer the second bill, and the *former bill dismissed* with 20 s. costs. Chan. Cases, 241. Mich. 26 Car. 2. Crofts v. Wortley. [439]

2. After dismissal on hearing, a new bill was exhibited on the same equity, on suggestion of notice which was not in issue in the former cause; and per lord keeper, the defendant's answer shall not conclude the plaintiff, but though he denied notice, yet the plaintiff shall examine thereto, and that in case examination shall be made as to the notice, and no proof of it, if the notice had been denied in the former suit, yet the plaintiff's bill *to have the defendant's oath* would lie, but then the defendant's oath should not be conclusive. Chan. Cases, 252. Hill. 26 & 27 Car. 2. Williams v. Williams.

3. A supplemental bill to have a *further discovery* from the defendant *by way of evidence*, for the better clearing the matters depending on the *account*, which the defendant hath not answered in Chan. Cases, 201, 202. Pasch. 23 Car. 2.

Bovey v. Skipwith, S. C. but S. P. does not appear. — 3 Chan. Rep. 67. S. C. but S. P. does not appear.

in the former cause; the plaintiff pleaded the former bill, to which the defendant answered, and the cause heard, and the account directed; the court ordered the defendant to answer to all matters in this bill not answered to in the former cause, but the plaintiff not to reply nor to proceed farther. 2 Chan. Rep. 142. 30 Car. 2. Boeve v. Skipwith.

4. In a bill of review, you may add a new supplemental bill. Vern. R. 135. pl. 226. Hill. 1682. Price v. Keyte.

2 Chan. Cases, 134. Hill. 34 & 35 Car. 2. Coventry v. Hall, S. C. & S. P. And the decree made by Ld. Nottingham, for the same profits, was confirmed by Ld. Keeper North. — 2 Chan. Rep. 259. S. C. & Ld. Keeper North confirmed the decree of Ld. K. Finch.

5. One bill was preferred to clear the title to lands, and after a decree for the lands, another bill was exhibited for the profits, and a 2d decree for them. 2 Chan. Cases, 72. Mich. 33 Car. 2. Coventry v. Thinn.

6. New bill after dismissal, was brought on the same equity by a 3d person, because he could not have a bill of review. 2 Chan. Cases, 119. Trin. 34 Car. 2. Doily v. Smith.

7. A dismissal on election to proceed at law is not preremptory; but plaintiff may, after she has [sued] at law, bring a new bill. 2 Vern. R. 32. pl. 24. Hill. 1618. Countess of Plymouth v. Bladen.

8. Where a supplemental bill is brought after publication, it is irregular to examine witnesses to a matter that was in issue, and not proved in the original cause; and such proofs not to be read. MS. Tab. March 31, 1725. Bagnal v. Bagnal.

9. If there be no proof to the new matter in the supplemental bill, it must be dismissed. MS. Tab. Mar. 31, 1725. Bagnal v. Bagnal.

(S. a) Answer. What is a full and perfect Answer. Where it must be fully and directly, or where to his Remembrance, &c. is sufficient.

1. A. Having 2 leases, was allowed to stand by answer upon them both, and not restrained to one at his peril. Toth. 70. cites Hill. 35 Eliz. Kirkham v. Saunderfon.

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2. The defendant derived his title by a lease and assignment which was before his knowledge, and therefore pleaded that he heard say, that such a lease and assignment was made; the master of the rolls was of opinion, because it was another's act, the oath is, that he thinks it to be true. The defendant might have pleaded directly, that they were made, as he thinketh. Toth. 70, cites 37 Eliz. Burgony v. Machell.

3. The defendant answered, that he had no evidences belonging to the plaintiff; that answer was disallowed, because the defendant therein

therein will be his own judge, whether they belong to the plaintiff or not; and therefore he was *ordered to answer what he had, and to bring them to be viewed to whom they belonged.* Toth. 70. cites 37 Eliz. Rotherham v. Saunders.

4. A man's own *acts* must be *answered directly* upon oath in the affirmative or negative, *without traverse*; as Mr. Justice Beaumont held. Toth. 71. cites 38 Eliz. Williams v. Leighton.

5. Whether a *licence to assign a lease* were granted or not, being but 3 years past, the defendant was ordered by my lord to answer *directly*, and not to his remembrance. Toth. 71. cites 38 & 39 Eliz. Oswald v. Pennant.

6. The defendant was ordered to *set down his term certain.* Toth. 72. cites 1597. Harbert v. Morgan.

7. It was held that if 2 *answer jointly and severally*, if one of them answers first for himself, and the other says, that he has perused all that the former has answered, and for himself answers, that he believes it to be true, supposing this other defendant not to be charged with any thing of his knowledge, that such a *relative* answer is sufficient in a joint and several answer, but not where the defendants answer severally *each apart.* Hard. 165. Hill. 1659. in the exchequer. Walker v. Norton.

8. An answer to a matter *charged as the defendant's own fact*, must regularly be, without saying *to his remembrance, or as he believes*, if it be *laid to be done within 7 years* before, unless the court, upon exception taken, shall find special cause to dispense with so positive an answer. Clarendon's Ord. 18 Car. 2.

9. On exceptions to an answer, the defendant having sworn that he received no more than the sum of . . . to his remembrance, it was allowed to be a *good answer.* Vern. 470. pl. 456. Trin. 1687. Hall v. Bodily.

10. Defendants made *affidavits that they had no books, evidences, &c. to their knowledge concerning the matters in question, but what were produced before the master, and annexed to a schedule.* This affidavit [is] evasive, and they were put to swear that they had no books or evidences concerning the matters in question, but what they had already produced. MS. Tab. June 10, 1713. Mayor, &c. of Hartford v. the Poor of Hartford.

11. If a man gives a general answer, and a *particular question is asked which is included in the general*, yet he *must answer it particularly*, else it may be demurred to; for that may be a matter of judgment. Select Cases in Chan. in *Ld. King's Time*, 53. Mich. 11 Geo. 1. Paxton's case.

(T. a) Answer. Oath. By whom, and in what Cases the Answer must be upon Oath.

1. **L**ADY Wharton was appointed to answer upon oath, and not upon her honour; and so they ought to be sworn as witnesses, (as my lord held), or else no attain lies if the jury do not go according to the evidences. Toth. 72. cites 1497. Willoughby v. Lady Wharton.

2. A *bishop* to answer upon oath. Toth. 74. cites 8 Car. The Mayor of Sarum v. the Bishop of Sarum.

3. It was ruled by the lord keeper, that a *plea of outlawry* should be without oath, because of the averment of identity of persons; and it was ruled that a *plea of the privilege of Oxford* should be put in without oath. 2 Freem. Rep. 143. pl. 182. Trin. and Mich. 1674. Masters v. Bruett.

And in a note there, page 782. it is said, that the like order was said to be made by Lord Harcourt in Dr. Heathcote's case.

4. Lord C. Macclesfield allowed a *Quaker*, who was committed for not answering to a bill exhibited against him, to put in his answer *without oath or affirmation, the bill being groundless*, and discharged him out of custody. Wms.'s Rep. 781. Hill. 1721. Wood v. Story & Bell.

(U. a) Answer. Where it shall conclude, or charge or discharge the Defendant.

2 Freem. Rep. 146. pl. 189. (bis) Mich. 1677. Anon. S. P.

—Where there is no proof *but what arises from the answer* of the defendant, the answer must be taken intirely as it is, and no part of it must be impeached by any other evidence; per Parker C. 10 Mod. 405. Pasch. 4 Geo. 1. in cane. Nab v. Nabb.

1. **T**HE plaintiff having made *no proof* of the matter in question, the defendant's answer must be *taken as true*, and so the court dismissed the bill. Chan. Rep. 95. 11 Car. Feltham v. Davy.

2. Where there is *but one witness against the defendant's answer*, the plaintiff can have no decree. Vern. 161. pl. 152. Pasch. 1683. Alam v. Jourdan.

3. Per cur. the case of HOWARD v. BROWN, was the first in this court where, because a man had charged himself by answer, that this answer should be *allowed as a good discharge*, and it ought to be the last. 2 Vern. 194. Mich. 1690.

4. Plaintiff for 80 l. conveys an *estate absolutely* to the defendant, and brings a bill to *redeem*. Defendant insists the conveyance was absolute, but *confesses*, that after the 80 l. paid, with interest, it was to be in trust for the plaintiff's wife and children. Plaintiff replies to the answer, but no proof was made of the trust; yet decreed

decreed the trust for the benefit of the wife and children. 2 Vern. 288. pl. 277. Pasch. 1693. Hampton v. Spencer, et c contra.

5. Where a bill had *unadvisedly charged that plaintiffs had agreed* to pay an equal proportion of the debts, they being sureties in the bond, yet *defendants by answer denying* they made any such agreement, that *set * plaintiffs at large*, and left them at liberty to demand the whole against defendants; and per Cowper C. decreed accordingly. 2 Vern. 608. pl. 546. Pasch. 1708. Parsons and Cole v. Doctor Briddock & al'.

6. A legacy being left to an executor without any express disposition of the surplus, but there was strong proof that testator intended him the surplus; but on a bill brought by the next of kin against him for a distribution, he answers, and *waives the benefit of the surplus by mistake of the law* in that point, and admitted himself accountable for the surplus; but being a creditor upon an open account, he insisted, that he ought to have his legacy over and above his debt. But upon better information he prayed to amend his answer as to the waiving the surplus, which was denied by the master of the rolls, but he decreed the legacy over and above the debt; and on appeal Ld. Cowper said, that he would not, against the defendant's own concession, decree the surplus for him. But in Easter term 1718, the cause coming before Ld. C. Parker, his lordship said, that he could not but incline to help the defendant, who by mistake, or mis-advice only of his counsel, was in a way of losing his right; and therefore, if the plaintiffs would bind the defendant by his answer from taking the surplus, they ought to take it on the terms in the answer, (viz.) he waives the surplus, but insists upon his debt and legacy, and decreed him both in this case, even though by the master's report it appeared, that the legacy was much greater than the debt. Wms.'s Rep. 297. pl. 74. Mich. 1718. Rawlins v. Powell.

(W. a) Answer. Where there is a Plea or Demurrer.

See tit. Plea and Demurrer.

1. IT is a rule in equity, that the answer over-rules the plea where defendant answers the same things he insists upon in his plea that he ought not to answer to. MS. Tab. Appeals, 20 Jan. 1717. Earl of Clanrickard v. Burk.

2. Defendant had an order to plead, answer, and demur, but not demur alone; but defendant answered only by denying, and demurred to every other part of the bill; but held by Ld. C. that he ought to answer some material fact of the bill, and the demurrer was discharged, with costs. MS. Rep. Mich. 12 Geo. 2. in Canc. Attorney Gen. v.

(X. a) Answer. In what Cases the Answer of one shall affect another.

1. Defendant by answer accuses himself and fellow defendant, and is believed against himself, but not against his fellow. Toth. 72. cites 4 Eliz. *Michell v. Webb*.

2. Two defendants, one having answered, the other refused, but shall be bound by the other's answer, if the cause pass against them. Toth. 74. cites 7 Jac. *Matthew v. Matthew*.

3. One defendant's answer shall not prejudice the other defendant. Toth. 75. cites 3 Car. *Eyre v. Wortley*.

[443] 4. A bill was brought against 3, viz. *A. B. and C. for a joint demand*. *A.* by answer swears, that he believes, and hopes to prove, that the plaintiff was satisfied his demands. The plaintiff replied to *B. and C. only*, and brought the cause on by bill and answer as against *A.* It was insisted, that the plaintiff in this case could have no decree; for having brought on his cause as against the third defendant on bill and answer only, his answer must be taken to be true; and though he does not directly swear the money paid, yet he says, he believes and hopes to prove it paid, but the plaintiff not replying to him, he is excluded of the benefit of his proof, and this was a cunning practice of the plaintiff to proceed against those defendants only who were ignorant of the matter, and to exclude the defendant who, perhaps, could have proved the debt paid. The plaintiff was ordered to pay costs, and left at liberty to reply to the other defendant. Vern. 140. pl. 132. Hill. 1682. *Barker v. Wyld* and 2 others.

5. Regularly the answer of one defendant shall not be made use of as evidence against another defendant; but one defendant saying by his answer, that he was much in years, and could not remember the matter charged in the bill, but that *J. S.* was his attorney and transacted this matter, and *J. S.* the attorney being made a defendant, and giving an account of this matter, here, upon a motion for an injunction, *Ld. Cowper* said, that these words in the defendant's answer amounted to a referring to the co-defendant's answer, and for that reason the attorney's answer ought to be read, and accordingly was read against the first defendant. Wms.'s Rep. 300. Mich. 1715. pl. 75. *Anon.*

6. One defendant shall not be prejudiced by the admission of another. MS. Tab. March 6, 1720. *Cheevers v. Geoghegan*.

(Y. a) Answer. How to be made and sworn where a Corporation is Defendant.

1. **A** Bill against a corporation to discover writings, defendants answer under the common seal, and so being not sworn, will answer nothing in their own prejudice. Ordered, that the clerk of the company, and such principal members, as the plaintiff shall think fit, answer on oath, and that a master settle the oath; per North K. Vern. 117. pl. 104. Hill. 34 & 35 Car. 2. Anon.

(Z. a) Answer taken. How. And at what Time.

1. **C**ommissioners for taking an answer in the country, had omitted *executio ipsius brevis, &c.* The answer was referred to the six clerks, but on motion, the commissioners having indorsed on the answer, *capit' & jurat'*, &c. secundum effectum & tenorem commission' huic annex', and had annexed the commission to the answer, it was ordered the answer should be allowed. Vern. 41. pl. 41. Pasch. 1682. Pen v. Chetle.

2. One of the defendants is in contempt, and stands out to a sequestration, and the cause is heard against the other defendants, yet he may come in and answer, and the cause be heard again as to him. Vern. 228. pl. 225. Hill. 1683. Phillips v. the Duke of Bucks.

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(A. b) Answer. Of putting in Answers where there is a Cross-Bill.

1. **I**f a bill is filed, and then a cross-bill, the first bill is to be answered before the other cross-bill; and where A. files a bill against B. & C. who put in insufficient answers, and prefer their cross-bill against A. and then B. becomes bankrupt; and after B.'s assignees bring their bill in nature of an original bill for account, and A. pleads the statute of limitations, and his plea was allowed; and afterwards the assignees bring their bill in nature of a bill of revivor, grounding it upon the former bill brought by B. and C. but Ld. Chancellor ordered, that C. should answer A.'s bill before A. should be obliged to answer the assignees bill. Wms.'s Rep. 266, 267. Mich. 1714. Child & al', Assignees of Sir Stephen Evans, v. Frederick.

2. The original bill is first to be answered, but if the plaintiff in the original bill will, after the cross-bill filed, amend his bill in things material, this amended bill, as to the amendments, is a new bill;

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and the plaintiff in the original bill shall be bound to answer the cross-bill, which was filed prior to the amendments made to the original bill, before the plaintiff in the original bill shall have an answer to his amendments; and as the amended bill must be answered all together, so the priority seems in such case to be lost as to the whole. 2 Wms.'s Rep. 345. Hill. 1727. Steward v. Roe.

(B. b) Answer. Of the Traverse.

1. IF the defendant denies the fact, he must traverse or deny it (as the cause requires) directly, and not by way of negative pregnant, as if he be charged with the receipt of a sum of money, he must deny or traverse that he has not received that sum or any part thereof, or else set forth what part he has received; and if a fact be laid to be done with divers circumstances, the defendant must not deny or traverse it literally as it is laid in the bill, but must answer the point of substance positively and certainly. Clarend. Ord. 18 Car. 2.

2. An answer wanted the general traverse at the end, and it was objected, that without this traverse no issue was joined. But per Ld. Macclesfield, it does not appear but that the whole bill and every clause in it is fully answered, and then the adding the general traverse is rather impertinent than otherwise; and if issue is taken upon this general traverse, it is only a denial of every other thing not answered before by the answer. Mich. 1722. 2 Wms.'s Rep. 87. Anon.

[445] 3. And his lordship said, that this general traverse seemed to him to have obtained formerly, and in ancient times, when defendant used only to set forth his case in the answer, without answering every clause in the bill; and for that reason it was the practice for the defendant to add, at the end of the answer, this general traverse. Mich. 1722. 2 Wms.'s Rep. 87. Anon.

(C. b) Of Referring Bills or Answers for Scandal, Impertinence, Insufficiency, &c.

1. WHERE an answer is excepted to be referred, and is reported insufficient, and the defendants did not except against the first report, but had put in another answer, they are to answer all the points excepted to, though the same exceed the bill. Chan. Cases, 60. Mich. 16 Car. 2. Crisp v. Nevill.

2. Plea to part, and demurrer to part; plea over-ruled; then defendant answered, and that being insufficient he put in another answer, and that being reported insufficient he put in a 4th answer; if the first be accounted one. Finch C. did not commit him to be examined on interrogatories. Chan. Cases, 279. Trin. 28 Car. 2. Clotworthy v. Mellish.

3. A bill was brought against 2 *defendants*, the answer of one is reported *insufficient*, and the report on exceptions confirmed; afterwards the other defendant puts in just such another answer, and *insisted on the same matter*. On petition, the court to avoid delay will judge on the insufficiency of the *second answer* without sending it to a master; per Finch C. Vern. 74. pl. 69. Mich. 1682. West v. Ld. Delaware & Cutler.

4. Where the defendant *answers to part*, and *pleads to all other matters* not answered unto, the plaintiff cannot put in exceptions to the answer till he has first argued the plea, or obtained an order that the plea shall stand for an answer, with liberty to except to the matters not pleaded unto. Vern. 344. pl. 336. Mich. 1685. Darnell v. Reyny.

5. If the plaintiff *refers the answer for scandal and impertinence*, and the master *finds it neither*, the plaintiff, in *exceptions to the master's report*, must shew *wherein, in what page, and how far*, the answer is scandalous or impertinent; per Ld. Macclesfield. 2 Wms.'s Rep. 181. Trin. 1723. Craven v. Wright.

6. And it seems stronger where exceptions are taken for insufficiency, and the master reports it *sufficient*, that the exceptions to the report should shew wherein the answer is insufficient. Ibid.

7. So if the bill or answer be referred for scandal, and the master reports it *scandalous*; if the master has once *expunged this scandal*, the party cannot then except to the report, because it cannot then be made appear by the record what the scandal was, and it was his own fault that he did not except sooner. Ibid. 182.

8. Ld. C. King made it a rule, that a bill shall not be referred for scandal after the defendant hath answered it; and by this means an old rule of court was altered. Mich. 1725. 2 Wms.'s Rep. 311. Abergavenny (Lady) v. Abergavenny (Lady).

9. After an order to refer an answer for *insufficiency*, it cannot be referred for *impertinence*, yet it may be for *scandal*. 2 Wms.'s Rep. 312. In a note added by the editor at the bottom, it is said to have been so determined. Hill. Vac. 1729. in case of Ellison v. Burgefs.

(D. b) In what Cases a Bill shall be taken Pro Confesso, after a full Answer. [446]

1. Plaintiff brought her bill against defendant for an account of profits, &c. and after defendant had fully answered, plaintiff amended her bill 3 times, to which defendant put in 3 several pleas and demurrers, which had been all over-ruled, and the defendant stood in contempt to a sequestration for not answering the amended bill.

Plaintiff now moved for liberty to set down the cause on the sequestration, in order that the bill might be taken pro confesso, &c. whereto it was objected that there being an answer to part (viz.) the original bill, the bill could not be taken pro confesso, because part was fully answered and denied, &c. and the case of

* See tit.
Pro Con-
fesso (A)
pl. 9. S. C.

* HAWKINS AND CROOK was cited. But on the part of the plaintiff, it was urged, that if defendant by answering part, and refusing to answer the most material point of all, should prevent the bills being taken pro confesso, that would put the plaintiff in a much worse condition than not answering at all, and would encourage defendants by this method to elude the justice of the court, &c. And as to HAWKINS AND CROOK, defendant there was willing and desirous to put in a full answer, and that was at length the liberty given him by the court. Ld. Chancellor said, that this is an untrodden path, and as there are no precedents to direct, we must go upon the reason of the thing. At law after the party has appeared and is in court, if he makes default, &c. judgment is given for the whole demand; and if in trespass, &c. defendant pleads, &c. only to part, and says nothing to the residue, plaintiff may take his judgment immediately for what is not answered, and courts of equity form their process upon the same plan when the party is in court, &c. and it is a jurisdiction which seems absolutely necessary and exercised by all courts, that when they have the parties once before them, they should have it in their power to determine upon the right, &c. and therefore seemed strongly to incline that the bill should be taken pro confesso quoad the particulars not answered. But the defendant offering to answer by the next term, except as to matter of account, no order was made upon the main question. MS. Rep. Mich. 4 Geo. 2. in Canc. Lady Abergavenny v. Lady Abergavenny.

2 Wms.'s
Rep. 311.
S. C. but
not S. P.

2. Nota, A case was mentioned in the exchequer, of the corporation of HELSTON v. ROBINSON, where after an answer reported insufficient, and defendant refusing to put in any further answer, the whole bill was taken pro confesso, by the opinion of the whole court delivered seriatim; and this was the opinion of the master of the rolls in the case of HAWKINS AND CROOK before cited, for that an insufficient answer is no answer, &c. and it is the party's own obstinacy to stand out and refuse making a discovery, &c. and the opinion of taking a bill pro confesso quoad some particulars, and joining issue, &c. as to the rest, seems new and introductory of great confusion in the proceedings; and Q. B. Ibid.

[447] (E. b) Amendment. In what Cases in Proceedings in Equity.

1. *AFTER replication* a better answer ordered. Toth. 71. cites 38 & 39 Eliz. Wilcox & Yates v. Fisher.

2. In a rejoinder and a *commission*, the defendant to *amend* her answer; but my lord said *not* to amend an answer *after issue joined*. Toth. 75. cites Mich. 9 Car. Chettle v. Chettle.

3. The defendant's answer which she had sworn, containing something which she afterwards found to be untrue, it was moved

Ibid. it was
said the like
liberty was

ed on her affidavit of the said matter untruly set forth, being occasioned by its being added in the margin of the draught after her perusal thereof, and her being thereby surprized, that she might have liberty to amend her said answer in the matters so mistaken; and upon affidavit of notice of this motion, and certificate that no replication was filed, and the plaintiff making no defence, she had liberty given her to amend. Chan. Cases, 29. Mich. 15 Car. 2. Chute v. Lady Dacres.

given before replication filed, in a case in Ld. Coventry's time, of Chettle v. Chettle.—2 Freem. Rep. 173. pl. 227.

S. C. cited in the principal case.——Toth. 75. Mich. 9 Car. S. C. & S. P. but not to amend it after issue joined.

But where the defendant having by her answer consented that an award made by her father might be confirmed, desired leave to amend her answer in that particular, she having made oath that she had never read the award, and that such answer was prepared for her by her father, who had wronged her in the award, the court denied to give her leave to amend. 2 Vern. 434. pl. 396. Pasch. 1702. Harcourt v. Sherrard and Dame Anderson Ux'.——Equ. Abr. 29, 30. pl. 5. has a note, that one reason seems to be, because the father was an arbitrator of her own chusing.

4. Some tenants of a manor brought a bill against the lord to discover ancient customs. The defendant demurred, because all the tenants of the manor are not made parties; but the court gave the plaintiffs leave to amend their bill, and to make the other tenants either plaintiffs or defendants as they would consent or not. Fin. Rep. 114. Hill. 25 Car. 2. Hudson v. Fletcher.

5. A conveyance by virtue of a power was set forth by the plaintiff in his bill, but without date, day, month, or year; whereupon the defendant demurred; but the court over-ruled the demurrer, and gave the plaintiff leave to amend his bill. Fin. Rep. 260. Trin. 28 Car. 2. Bushell v. Newby.

6. A decree was made against baron and feme, and all the process of contempt was right till the serjeant at arms; but the order for that was only against the baron, and so likewise was the sequestration. The husband died, and after his death a sequestration went against the wife's jointure; and it was moved to be amended, but the party could not prevail. Chan. Prec. 115. pl. 102. Arg. cites Trin. 1700. Northcott v. Northcott.

7. A recognizance was entered into by F. as surety, that a party in the cause should abide such order as should be made upon the hearing. Afterwards an order was made for confirming of the report, but in the title of the said order the words (et ux') were omitted. An action being brought upon this recognizance against F. the surety, he took advantage of this omission, and pleaded that no such order was made in the cause; whereupon the plaintiff, perceiving the mistake, obtained an order from the master of the rolls to amend the order by adding the words, and the same was afterwards confirmed by the Id. keeper. 2 Vern. 376. pl. 339. Trin. 1700. Spearing & Ux' v. Lynn,

Chan. Prec. 115. pl. 107. Spearing v. Lynn & Ux' and Field & al', S. C. and that the title of the order was to be amended nisi, &c. and afterwards it was insisted against the

amendment, for that the defendant was only a surety; but on the other side * it was said, that this was only the mistake of the clerk, and ought to be amended to carry on the justice of the court; and cited the case of EARL v. EARL, this term, where an affidavit, made before a sequestration, was not filed before the sequestration made, but was ordered to be filed after to support the sequestration, and the order of amendment was made absolute in the principal case.

* [448]
8. Bill

8. Bill was brought for an account of the personal estate of one T. E. The defendant having answered, and witnesses being examined, it happened that *in the title of the interrogatories the plaintiff was called Tho. White instead of John*. The court said they cannot read the depositions, nor can the title be amended, and this although most of the witnesses were, since their examination, gone to sea. Vern. 435. pl. 398. Pasch. 1702. White v. Taylor.

9. No proceedings upon an amended bill till the *costs* of the former proceedings are *discharged*. MS. Tab. December 6, 1705. Gage v. Lister.

10. Wherever there is new matter in amended or supplemental bills, there can be no proceedings against the defendant without a *new service ad faciend' attorn.* and a cause cannot be brought to a hearing without it; for the defendant ought to have an opportunity to defend against the new matter. MS. Tab. March 6th, 1720. Cheevers v. Geoghegan.

11. There does not appear to be any precedent in chancery of an amendment to a bill in a part, *wherein it has been dismissed upon the merits*; per Ld. C. King, assisted by the master of the rolls. 2 Wms.'s Rep. 402. Hill. 1726. Sir John Napier v. Lady Effingham.

S. P. admitted per cur. 2 Vern. 224, 225. Pasch. 1691. in case of Cecil v. the Earl of Salisbury. — 12. If a decree be made against an infant, relating to his inheritance, *with a nisi causa within 6 months after age*, he may amend his answer; and all decrees against infants give them six months after age to shew cause. 2 Wms.'s Rep. 403. Sir John Napier v. Lady Effingham.

v. the Earl of Salisbury. — The infant at his full age may (as the right way is) apply to the court, and set forth how he is grieved by the decree, and may have leave to amend or alter his answer, or any part of it, or put in a new one; but if he does not do so, it shall be presumed that he abides by it, and so it shall be read against him; and so it was done in the principal case. Gillb. Equ. Rep. 3, 4. Hill. 6 Ann. The Lord Guernsey v. Rodbridges.

13. The master of the rolls refused to hear any proof that the record of an *answer in chancery* was mistaken, in being made *contrary to the original draught*. But afterwards upon very full *affidavits* by the solicitor and his clerk, that this was only a mistake in the person that ingrossed the answer, and the foul draught being produced, upon solemn debate before the ld. chancellor, assisted by the master of the rolls, the court gave the defendant leave to amend the answer, and to swear it over again, though *no precedent* could be shewn that amendment was ever made after the cause heard, and this matter had been before denied on a petition and on a motion. 2 Wms.'s Rep. 425. 427. Mich. 1727. Gainborough (Countess) v. Gifford.

(F. b) Relief without a Bill, or not prayed.

1. **A** Decree was made without a bill. Toth. 125. cites Mich. 9 Jac. Bull v. Huddleton.

* 2. A legacy was presumed, after a great length of time, to be paid; and a perpetual injunction was decreed against a bond given about 30 years since relating thereto, and a former decree was *discharged*, though inrolled, and though no relief was particularly prayed against that decree. 2 Vern. 23. pl. 14. Pasch. 1687. Fotherby v. Hartridge.

3. The defendant, in this case, being advised he had *paid* one Nailor, who was his solicitor in this cause, *more money than could be due to him*, obtained an order to have his *bills referred* and taxed, which was done; and upon the taxation he was reported to be *over-paid* 60*l.* thereupon he moved the court for a *ne exeat regnum* against Nailor, *on affidavit* that he was going beyond sea with my Lord Cornbury, the governor of Jamaica, and the writ was granted by the master of the rolls, in the absence of my ld. keeper, though there was *no bill* in court *whereon to ground this writ*. Ch. Prec. 171. Mich. 1701. Loyd v. Cardy.

For more of Chancery in general, see **Charge, Charitable Uses, Common Conditions, Contribution, Copyhold, Devises**, and other proper titles throughout this work.

Charge.

(A) In what Cases a Charge made by one shall bind another.

See tit. Rent (D. 2) and tit. Remainder (K)

[**E**.] If a man devises lands to J. S. and his heirs, upon condition that he shall grant a rent-charge in fee to J. D. the remainder of the land to W. N. in tail, and J. S. grants the rent accordingly, and dies without issue, this charge shall bind this remainder, because it was not granted merely out of the estate of the tenant in tail, but also partly by force of an authority of the devisor, for it was the will of the devisor who had power to charge it; and this was made in preservation of the estate of him in remainder, for

Cro. J. 427. pl. 2. Dutton v. Enggram, S. C. adjudged, but there it is, (that if J. S. die without heirs of his body, that

the lands.
should re-
main to the
said J. D.
and the heirs
of his body.)
— Poph.

131. Gouldwell's case, S. C. it was agreed per cur. that the grantee was in by the devisor, and not by the tenant in tail.

Cro. J. 427,
428. pl. 2.
Dutton v.
Engram,
S. C. ad-
judged ac-
cordingly.—
Poph. 131.
Gouldwell's
case, S. C.
says, as to
the second
point, that
this rent be-
ing to be

granted to him in remainder, the intent of the devisor is thereby explained, that he shall have the rent only till such time as the remainder comes into possession, for that now the rent shall be drowned in the land by the unity of possession.

* [450]

[2. So it had been in this case, if the remainder in tail had been limited to him to whom the rent ought to have been granted; for though the devisor appoints that it should remain to the same person to whom he appoints the rent to be granted, yet it cannot appear that his intent was, that the rent should not continue longer than during the * continuance of the first estate tail, because the rent is a fee, and shall go to his collateral heirs, when heirs of his body fail, and so more large than the estate of the land. Mich. 15 Jac. B. R. between DUTTON AND INGHAM adjudged, per totam curiam, præter Croke, who seemed e contra, because of the intent of the devisor aforesaid, which intratur P. 15 Jac. Rot. 204.]

[3. So if a man devises lands to J. S. in tail, upon condition that he shall grant a rent in fee to W. S. the remainder of the land to a stranger, and the devisee grants the rent accordingly, and dies without issue, this will bind the remainder for the cause aforesaid. Mich. 15 Jac. B. R. between DUTTON AND INGHAM, per curiam.]

Cro. J. 427,
428. S. C.
adjudged a
good grant
of the rent
in fee issuing
out of all the
estate, and

not out of the estate tail only, and being guided by the directions of the will, it shall take according to the limitation thereof, and charge all the inheritance. Poph. 131. Gouldwell's case, S. C. Haughton J. said, that the intent of the devisor seemed to him to be, that inasmuch as the land is limited in tail, and the rent in fee, that by this the grantee should have power to grant or dispose of the rent in what manner he would; but if the land had been in fee, he should have construed his intent to have been, that the grantee should have the rent only until the remainder fall; to which Doderidge agreed, and said, that this in the case of a will, and this construction stands with the intent of the devisor, and likewise with the statute, which says, quod voluntas donatoris est observanda.

† S. C. cited
Arg. 4 Le.
90. in pl.
138.—
Jenk. 238.
pl. 17. S. C.

[5. If a man seised in fee suffers a recovery to the use of the recoverors, until they have made a lease for certain years, and after to the use of himself, if the recoverors lease for years accordingly, he that hath the use after shall never avoid it; for he comes under the lease. † Dyer, 12 Eliz. 290. 61. by all the justices. Co. 2. Beckwith 57. b. Mich. 15 Jac. B. R. between DUTTON AND INGHAM it was so agreed, per totam curiam.]

Cro. E. 216.
pl. 14. Hill.
33 Eliz.
R. R. Harry
v. Thomas,

[6. If the baron be seised of lands in fee in right of his feme, and thereof makes a lease for years, and after he and his wife levy a fine come ceo, &c. to J. S. in fee, and after the baron dies, the comtee shall hold the land discharged of the lease, for the lease was void by

by the death of the baron, for the baron joined (*) but for conformity and necessity, for all the estate passed from the feme. H. 33 Eliz. B. R. adjudged, quod vide cited Co. 1 Bredon 76. Co. 2. Cromwell 77. b. Mich. 32, 33 Eliz. B. R.]

* Fol. 389.
seems to be
S.C. & S.P.
adjudged ac-

cordingly. — Le. 247. pl. 332. S. C. & S. P. held clearly by the whole court. — 4 Le. 14. pl. 54. S. C. Wray Ch. J. held accordingly, but Gawdy J. e contra. — S. C. cited Arg. 3 Bulst. 273. — See tit. Fine (S. 2) pl. 5. and the notes there.

[7. So if the baron, seised in fee in the right of the feme, acknowledges a statute, or grants a rent out of the land, and after he and his wife join in a fine come ceo, &c. to J. S. in fee, and after the baron dies, J. S. shall hold the land discharged of the rent, and statute, for the cause aforesaid. Co. 2. Cromwell 77. b. said to have been adjudged in B.]

S. P. held
accordingly,
in the case
of Harvy v.
Thomas.
Cro. E. 216.
pl. 14. Hill.
33 Eliz.
B. R. and

they cited it as resolved in the Lord Mountjoy's case, 24 Eliz. that the recognizance of the baron shall not bind the conusee of a fine, and the conusee is in by the feme, and the baron joins only for conformity. — 3 Le. 254. Mich. 32 Eliz. C. B. cites Ld. Mountjoy's case, thus, viz. Ld. M. took to wife an inheritrix, by whom he had issue, and so was intitled to be tenant by the curtesy. † He acknowledged a statute, and afterwards he and his wife levied a fine and died; now the conusee shall hold the land discharged of the statute; for after the death of the husband, the conusee is in by the wife only, and so is in paramount the charge.

† [451]

[8. But if the baron and feme are jointenants in fee, or in tail, upon a conveyance to them made during coverture, and the baron acknowledges a statute, and after he and his wife levy a fine come ceo, &c. to J. S. and suffer a recovery to him, and after the baron dies, yet J. S. shall hold it charged with the statute; for he comes in as well of the estate of the baron as of the feme, for the whole, for there are no moieties between them.]

[9. [But] if baron and feme are jointenants in fee, upon a conveyance to them made before marriage, and the baron acknowledges a statute, or grants a rent out of the lands, or leases the land to another, and after he and his wife levy a fine come ceo, &c. to J. S. and after the baron dies, it seems that J. S. shall hold one moiety discharged, and the other moiety charged with the said charges; for it seems the moiety of the feme is discharged by the death of the baron, for it seems the baron had no power to charge the moiety of the feme but during her life.]

10. In alise the case was, that tenant in tail granted a rent-charge, and died; the issue entered, and infeoffed N. and re-took estate, and yet it was awarded that the charge was determined; because by the entry of the heir all was extinct. Br. Charge, pl. 20. cites 14 Aff. 3.

11. If tenant by elegit takes confirmation for term of his life of the making of the tenant of the franktenement, by this he is in by the tenant of the franktenement, and not in the post by the law, as he was before; and then, if the tenant of the franktenement had charged the land mesne between the execution made by the exigent, and the confirmation made, he shall hold charged where he was discharged before; quod nota. Br. Extinguishment, pl. 30. cites 31 Aff. 13.

12. If

12. If there are two jointenants, and the one grants a rent-charge, the grantee may distrain the beasts of the grantor upon the land, but not the beasts of the other. Br. Charge, pl. 39. cites 11 H. 6. 35.

1 Rep. 128.
a. (b) cites
S. P. agreed,
in S. C.

13. *A. tenant in tail. remainder to B. in fee. B. grants a rent-charge out of the lands to J. S. and afterwards A. makes a feoffment in fee to W. R. and dies without issue*, yet the possession of the feoffee, (so long as the feoffment remains in force) shall not be charged with the rent, because he is in of the possession given him by the tenant in tail, which was not subject to the payment of the rent. 1 Rep. 62. a. (d) Pasch. 23 Eliz. C. B. in Capel's case, alias Hunt v. Gately.

14. If tenant for life be, the remainder over in fee, and tenant for life grants a rent-charge, and afterwards ceaseth, whereupon the lord recovers in a cessavit, he shall hold the land charged. Arg. 3 Le. 255. pl. 339. Mich. 32 Eliz. C. B. in the Serjeant's case.

1 Rep. 62.
b. Capel's
case, S. C.
adjudged ac-
cordingly.--
Mo. 154:
pl. 298.
S. C. ad-
judged ac-
cordingly,
after con-
ference with
all the judges
of England.

15. *A. tenant in tail. Remainder to B. in tail. B. charges the land with a rent or lease, and then A. suffers a common recovery, and dies without issue*. The recoveror shall not be charged with this lease or rent; because the possession and the new estate of the recoveror, which he has gained from A. the tenant in tail, is subject to the charges and leases of the recoveror, and cannot be subject to the leases and charges of B. in remainder also simul & femel. 1 Rep. 127. b. 128. a. cites it as adjudged by all the judges of England. Mich. 34 & 35 Eliz. in case of Hunt v. Gately.

4 Le. 150. pl. 263. S. C. argued; sed adjornatur. And. 282. pl. 299.
S. C. adjudged. Goldsb. 5. pl. 11. S. C. adjudged. Jenk. 250. pl. 43. S. C. S. C.
cited 2 Rep. 52. b. S. C. cited 2 Roll. Rep. 221.

[452]
2 And. 66.
pl. 48. S. C.
but S. P.
does not ap-
pear.

16. *A. tenant in tail for life. Remainder to B. in tail. Remainder to C. in tail. A. & B. join in a fine come cee, &c. to J. S. who renders a rent of 40l. a year to A. afterwards B. dies without issue*, whereupon C. enters. A. distrains for the rent, and adjudged that he well may, for that the rent remains after the death of B. without issue, so long as A. the tenant for life shall live. 1 Rep. 76. a. Mich. 39 & 40 Eliz. Gardiner v. Bredon.

17. Dr. Cary being seised in fee, makes a *settlement to the use of himself for life, remainder to Sir Geo. Cary for life, remainder to the trustees to preserve contingent remainders, remainder to the first and every other son of Sir Geo. Cary, in tail male, remainder to Wm. Cary for life, with like remainders to his first and every other son in tail male, remainder to Nich. Cary for life, remainder to his first and every other son in tail male, remainder to Dr. Cary in fee*.

Dr. Cary dies, and on his death, the remainder to Sir Geo. Cary comes into possession, and the remainder in fee descended on Sir Geo. Cary.

Sir Geo. Cary being seised of an estate for life, with remainder to his first and other sons in tail male; with the like remainders to Wm. Cary, and Nich. Cary, and being also seised of the reversion in fee which descended to him as heir to Dr. Cary, confesses a judgment, and afterwards dies, and then the

estate

estate limited to Wm. Cary takes effect, and the reversion in fee descends to him; he had two sons; they die; and so the reversion in fee comes into possession.

And now the question is, whether this reversion when it came into possession was liable to the judgment confessed by Sir Geo. Cary.

And Ld. Chancellor said, I am of opinion that it was liable to such judgment, because it was the estate of inheritance of Sir Geo. Cary, and as it was so subject to the intermediate estates for life, it was in him liable to be granted or charged, or incumbered by him as he thought fit; and as he might have granted or charged this reversion, so might he have granted a lease for 1000 years out of it if he had pleased, and which would have taken effect out of the reversion in fee; and if it had come to Wm. Cary, he could not have claimed such reversion, but subsequent to that lease; and as he might have done so, in like manner might he have charged it by judgment or statute.

The point that was in the case of *KELLOW AND ROWDEN*, in 3 Mod. does not seem applicable to this case, for that was on an action on a bond by the father against the 2d son as heir to the father; for in that action the 2d son was charged as immediate heir to the father, and in this case it appeared that the father had settled land on himself for life, remainder to his first son in tail, remainder to himself in fee.

The father dies, the estate comes to the first son, who dies leaving a son, and then the son dies, and on his death the land descended to the 2d son as heir to the father.

In this case it was not doubted but that this estate was the estate of the father, and liable to the debt; but the question was, if the plaintiff in that action had well charged the defendant as immediate heir to his father, and whether he ought not to have charged him as heir to the nephew, and have shewn his pedigree for that purpose.

Mr. Justice Giles Eyre held, that he was not well charged, but the other 3 justices held that he was.

But Mr. Justice Giles Eyre in that case said, that it was not doubted but that the reversion in fee, which took place in the second son, was vested in the first son, and that the first son might have charged it with statute, judgment, or recognizance; which was not denied by the other justices.

So that it could not be doubted, but that if he had made a lease for years out of the reversion, and such reversion had after come to the brother, but that it must have been subject to that lease.

The stating this proves the difference, and that it would not be liable to the bond of Sir Geo. Cary, as assets by descent, because that cannot be where there is an intermediate estate, but must be where the heir takes as immediate heir to the ancestor that entered into the bond.

But on judgment you charge the tertenant of the estate that was in the person that was the consuror of the judgment, but not so by his bond, unless the lands came as assets by descent to the very heir of Sir Geo. Cary.

This will not be liable to the inconveniencies as were by me at first apprehended; for if either of the persons that took an estate tail had suffered a common recovery, there would have been an end of the reversion in fee.

Where there is a tenant in tail

Charge.

tail with reversion to him in fee, and this reversion descends to the defendants, they must take it liable to the judgment, or statute, or recognizance of any of their ancestors, in whom the estate at any time was; and therefore I am of opinion that this reversion is liable to the judgment. As to a fine that was mentioned, as it is not produced before me, I cannot give any determination upon it, but it seems to operate no otherwise than as a grant of the reversion, which being subsequent to the lien that was on it by this judgment, and the plaintiffs filing their bill in 1726, which was but 2 years after such fine, the same is no bar to the plaintiffs. MS. Rep. Dec. 1740. Giffard v. Barber.

(B) Charge. What is a Charge on Land; and on what Land.

1. IF a man *charges his manor* of R. and *after a tenancy*, that is held of the manor, *escheats*, now this is parcel of the manor, and yet shall not be charged, for it was not parcel at the time of the grant, but then the services thereof were parcel of the manor. Br. Charge, pl. 50. cites 22 Aff. 10.

2. A. devised lands for payment of debts and legacies, and gave legacies to 3 younger children, and *makes his wife executrix* without more words, *but devised* that his 3 children *should release to his executrix* all such actions and demands of his *personal estate*. The personal estate shall be first applied *in aid of the heir*. Chan. Cases, 296. Hill. 28 & 29 Car. 2. Pain's case.

2 Chan. Cases, 127. S. C. but very imperfectly reported.

3. A. having begun to build a house, made his will soon after the statute of frauds, and thereby *devised lands for raising* younger children's portions, and payment of his debts, and appointed 400l. to be laid out in finishing his house. The will was not attested as that act required for passing lands, so that the younger children could take no benefit of the devise, notwithstanding which, the son and heir of A. insisted on having the 400 l. out of the personal estate; but ld. chancellor decreed, that the *personal estate shall not be lessened* in prejudice of younger children, *to make good a direction* in the father's will for the benefit of the eldest son, when he at the same time takes advantage of a defective execution of the will, and defeats the father's intentions in favour of his younger children. Vern. 95. pl. 83. Mich. 1682. Husbands v. Husbands.

4. A. covenanted or gave bond to settle land or annuity out of land of 100 l. a year, but had no land at the time of the settlement; an after purchase shall be liable, and that against a voluntary devisee. 2 Vern. 27. pl. 90. Pasch. 1689. Tooke v. Hastings.

5. Bill to be relieved and indemnified against an annuity of 100 l. per ann. charged upon the plaintiff's jointure, and payable to the defendant Oldfield for his life, &c. upon this case. Mr. Ramsden (the plaintiff's late husband) treating with the plaintiff's friends and relations about a marriage with the plaintiff, did propose

propose to settle certain lands in jointure upon her; the proposals being laid before counsel in order to draw a settlement, it was objected upon looking into the title, that the *lands proposed to be settled in jointure were subject to this rent-charge of 100l. per ann. to the defendant Oldfield for life*, and the plaintiff's counsel did insist that Mr. Ramsden ought to give security to indemnify the plaintiff's jointure from this charge, and thereupon Mr. Ramsden did give a bond to indemnify, but that not being thought a sufficient security, he offered to get the defendant Appleyard (a man of a considerable estate) to be bound with him for a security; and upon his application to Mr. Appleyard, who was his friend and kinsman, Mr. Appleyard, by letter directed to Mr. Ramsden, writes thus (viz.) *That he is willing to be bound with him, viz. Mr. Ramsden, to indemnify the lady's jointure from the said annuity, and doth by this his letter oblige himself so to do.* This letter being produced to the plaintiff's counsel, he was satisfied with it, and thereupon the settlement was made, and the marriage took effect, and there was a bond drawn pursuant to this agreement, which was executed by Mr. Ramsden, but never executed by Mr. Appleyard. Mr. Ramsden died insolvent in 1717, and Mr. Oldfield's annuity being secured by demise and re-demise of part of the jointure lands, brought an ejectment against the plaintiff to recover his rent-charge, and thereupon the plaintiff brings her bill in this court against the executors of her husband, and against the executors of Mr. Appleyard, and also against his heir at law, to whom he devised all his real estate subject to the payment of his debts. The principal point in this case was, if the heir at law and devisee subject to the payment of debts of Mr. Appleyard, should be liable to indemnify the plaintiff's jointure from this rent-charge, by force and virtue of this letter to Mr. Ramsden, without having executed the bond to indemnify, Mr. Ramsden the plaintiff's husband dying insolvent, and the executors of Mr. Appleyard having no assets. The defendant's counsel insisted that the heir at law of Mr. Ramsden, as well as his executors, ought to have been made a party to this suit; for if he had assets by descent, he would be liable to satisfy the whole, Mr. Appleyard being only a surety (supposing his heir to be bound by this letter), ought not to be charged. 2dly, That Mr. Appleyard had no consideration for indemnifying the plaintiff's jointure from incumbrances, and therefore *nudum pactum*, and not binding. 3dly, That this promise of Mr. Appleyard was in its nature barely executory, and parties concerned in interest ought to have come into this court for a specific performance of this agreement in his life-time, and during Mr. Ramsden's life-time, and then Mr. Appleyard might have made himself safe by taking a collateral security. 4thly, That this letter cannot bind his heir at law and devisee. Per Parker C. it is not so much as suggested in all the pleading in this cause, that Mr. Ramsden left assets real or personal to save the defendant harmless from this rent-charge, and the exception of want of proper parties ought to have been made before the cause was at hearing, if the defendants would take advantage



thereunto; or if the devise for sale of lands for the payment of debts is general, and he after devises all the rest and residue of his personal estate, having already made provision for the payment of my debts and legacies out of my real estate, or out of such particular lands, &c. or such like clauses; in such cases the real estate so subjected shall not be exonerated by the personal; and cited the case of *LADY GAINSBOROUGH*, and of one *YARWAY*, and several others. *Gilb. Equ. Rep. 73, 74. Mich. 9 Ann. in case of Hall v. Brooker.*

Chan. Prec. 423. S. C. reports it as a Vern.

701. that the personal estate devised is not liable. —

But Wms.'s

Rep. 291. 294. S. C. reports that the cause coming on again, on the equity reserved after the trial of an issue that had been directed by the court, the Ld. Chancellor seemed strongly of opinion, that the personal estate should be applied in case and exoneration of the real estate; 1st, because the *father's will* said that his executors should by his personal estate pay and levy his debts; and it (though the will were silent) on the testator's dying indebted, the personal estate ought to be applied to pay the debts in case of the real, a fortiori it must be so, when the will was express that all the debts shall be paid thereout. 2dly, This 300 l. was a debt; for so is all money borrowed. Indeed it was a debt of a special nature, and for which there was a particular remedy, not by mutatus at law, nor by bill in equity, but by ejectment to recover the possession on default of payment. 3dly, If the mortgagee had been in possession it would not have made it less a debt, since the creditor would thereby have had his remedy in his own hands. 4thly, It was such a debt as the mortgagor took great care that he, his heirs or assigns, might at any time have liberty to pay off. 5thly, The running on of interest, and its carrying interest, proved its being a debt; and the proviso saying, that if the mortgagor, his heirs or assigns, should pay the 300 l. and the rent, or arrear of rent, &c. in this case by the word (rent) was to be understood the interest or profit of the money, and what the money yielded. Lastly, He said it plainly appeared from hence to be a debt, viz. that in case a mortgagee died, and the mortgagor come to redeem, he should pay the money to the executor, and not to the heir of the mortgagee, though it was a mortgage in fee, it being money secured by and due on land; wherefore, upon the whole, his lordship thought it a strong case in favour of the heir, and decreed accordingly. — *Gilb. Equ. Rep. 106. S. C. in totidem verbis with Chan. Prec.*

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There is † no express clause to exempt the personal estate, and that has always been the distinction in this court; per Ld. Cowper. Chan. Prec. 458. S. C. — Chan. Prec. 456. S. C. reports that A. gave the residue of

10. A. by his will directed that his debts, legacies, and funerals should be paid out of the rents of his real estate, and his executor to receive the rents till B. came of the age of 25, and then to pay the surplus to B. and gives some legacies, and then gives the residue of his personal estate to B. B. dies an infant. Per Cowper C. if in the case the residue of the personal estate unbequeathed had been devised to a stranger, or to a 3d person, he should have had it free and exempt from payment of debts; but the devisee of the surplus of the land and of the personal estate being one and the same person, on consideration of the whole will, he thought the surplus of the personal estate was not intended to be devised to B. free and exempt from payment of debts. 2 Vern. 740. pl. 647. Hill. 1716. *Doleman v. Smith.*

his personal estate (before unbequeathed) to B. so that if the personal estate had been devised to a stranger, Ld. Cowper held it might have had another consideration from the meaning of the words (before unbequeathed); but here he thought it could not. — *Gilb. Equ. Rep. 128. S. C. in totidem verbis.*

† *Gilb. Equ. Rep. 72. Mich. 9 Ann. in cane. Hall v. Brooker, S. P.*

11. The

11. The *real estate is expressly charged with the payment of debts*, and the *personal estate is given to the executor*. Adjudged that the executor takes not the personal estate to his own use, but as executor; and then it shall be applied to discharge the real estate in favour of the heir at law. Pengelly said, that *if these words (to her own use)* or the like *had been added*, it might give some cause of doubt, but little stress was laid on the manner of creating her executrix. The decree was directed to be of the surplus of the personal estate after the legacies paid. Gibb. 41, 42. Hill. 2 Geo. 2. in the exchequer. Lucey v. Bromley.

12. A. seized in fee makes a mortgage, and then devises the lands to B. and gives several money-legacies to C. D., &c. and wills that all his debts shall be paid out of his personal estate; and if that be not sufficient, then the legatees to abate in proportion. The question was, whether the mortgage should be paid out of the personal estate, so as to disappoint the legatees, there not being sufficient to pay both, &c. Per master of the rolls, it is a rule in this court that a *hæres factus*, as well as *natus*, shall have aid of the personal estate, but not to disappoint legatees; and therefore if the heir or devisee does exhaust the personal estate, as they may at law, this court will turn the legatees upon the land, &c. But this case turns upon the particular wording of the will; and though the testator, willing his debts should be paid out of his personal estate, and if that falls short, then the legatees should abate in proportion, seems *prima facie* to import no more than the law says, and so are to be considered as surplusage, yet it holds upon consideration that these words do really import more; for if the personal estate was exhausted by the devisee to pay the mortgage, as it might be at law, then by the law of this court, which is as much the law of the land as the common law, the legatees should come upon the land without any abatement; but here the testator says, they should abate in proportion, and consequently to give them a remedy upon the land is to contradict the will; wherefore *the debt upon the mortgage is to be computed amongst the other debts of the testator, and the surplus only to be divided amongst the legatees, &c.* MS. Rep. Mich. 4 Geo. 2. in *canc.* Reeves v. Herne.

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(D) Charge. Where, on the Real Estate.

1. NO man can charge his heir but as a part of himself, and therefore beginning with himself. Hob. 130. pl. 172. Trin. 12 Jac. Oates v. Frith.

2. As to the disposal of my estate, I devise the same as follows; and then devises *White-acre* to B. his eldest son *in tail special*, remainder to his 3 other sons *in tail male* successively, and devises *copper-mines, &c.* to B. to be sold to pay debts, and then gives to his daughter 30*l.* per ann. till 12 years old, and afterwards 50*l.* per ann. till marriage, and gives her 1500*l.* to be paid by B. within 3

months after marriage, and makes B. executor, and dies. The personal estate fell short. Cowper C. ordered precedents to be searched, but thought the lands not charged. Chan. Prec. 449. pl. 287. Mich. 1617. The *Ld. Pawlet v. Parry*.

3. A. seised of land in fee devised several legacies, and then devised lands to B. and C. his wife for life, upon condition that B. his executors, administrators, and assigns, should pay all his debts and legacies; and after the death of B. and C. he devised the inheritance to D. and the heirs of his body. B. C. and D. joined in sale of the lands to J. S. It was urged that by the limitation over to D. in tail the condition was destroyed, and so the purchaser's estate not liable in law or equity to the debts or legacies, though he had notice. But per cur. the lands are liable in equity, and so decreed against the purchaser with damages and costs, and he to take his remedy over against C. (B. being dead) for the profits received, and he was decreed to pay the same to the purchaser, for which purpose he was to have the benefit of this decree. Nelf. Ch. Rep. 38. 12 Car. 1. *Newell v. Ward & Brightmore*.

S. C. cited per Cowper C. 2 Vern. 718. in case of *Wainwright v. Bendlowes*. — In such case the personal estate, though bequeathed to his executor, shall be first applied; for he takes it as executor, and the Je-

vise is superfluous; but if the same had been devised to a stranger, who was not executor, such stranger should take it discharged of debts, or only to be in aid of the real estate. *Gilb. Equ. Rep. 72. 9 Ann. Hall v. Brooker*. — But in such case if any particular legacy, as a horse, or 500 l. in money, or any part only of the personal estate, be bequeathed to an executor, such particular legacy, not being cast upon him by the law only, shall not come in aid in case of a deficiency; but he shall be chargeable only in respect of the surplus cast upon him by the law. Agreed. *Gilb. Equ. Rep. 73. in case of Hall v. Brooker*.

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This amounts to a charge on the lands; for J. S. is not to have the lands till after the debts and legacies are paid. Chan. Prec. 398. pl. 270. Pasch. 1715. *Tomkins v. Tomkins*.

5. *My debts and legacies being first deducted, I devise all my estate real and personal to J. S.* Per Finch C. this amounts to a devise to sell for payment of debts. Vern. 45. pl. 45. Pasch. 1682. *Newman v. Johnson*.

Chan. Prec. 398. pl. 270. Pasch. 1715. *Tomkins v. Tomkins*.

2 Chan. Cases, 117. Trin. 34. Car. 2. S. P. in case of *Culpepper v. Anon.*

6. A. devised his debts to be paid out of his real and personal estate. The executors paid more than his personal estate. They shall be reimbursed out of the real estate. 2 Chan. Cases, 109. Trin. 34 Car. 2. *Anon.*

7. One devised all his lands to A. and the heirs of his body, remainder over; and in another part of the will devised to A. all his personal estate, and makes him executor, *willing him to pay his debts*. This is a charge upon the *lands* as well as upon the *personal estate* to pay the debts. Vern. 411. pl. 386. Mich. 1686. *Cloudsly v. Pelham*, cited per Hutchins Commiss. N. Chan. Rep. 178. in the case of *Webb v. Sutton*; and distinguishes between a desiring in a will to pay debts, and desiring to pay a *money-legacy*; that in the last case it is no charge on the land.

The court said that this case was affirmed in Dom. Proc. 2 Vern. 229. Pasch. 1691. in pl. 208. Real estate was decreed to be charged with an annuity given

by the will, *though no express words to charge the land, the executor being devisee of the land*. Per lords commissioners. 2 Vern. 143. pl. 140. Trin. 1690. *Elliot v. Hancock*. — But this case was denied by the master of the rolls, 4 Nov. 1738. in case of *Miles v. Leigh*.

8. *As for my worldly estate I give my daughter 10 l. to be paid by my executor, and I give her 10 l. per ann. during her life, to be paid by quarterly payments; and all the rest of my real and personal estate I give to my son, &c.* The court doubted if this was a charge on the real estate. Nels. Chan. Rep. 155. Hill. 1689. at the rolls. *Joyce's case*.

As for my temporal estate, *whereas with God hath blessed me, I give and dispose thereof as follows;*

First, I will that all my debts be justly paid which I shall owe at my death to any person or persons whatsoever; also I devise all my estate in G. to J. S. This was all the real estate the testator had. Per Ld. Keeper Wright, this is a charge on the real estate for payment of debts. Ch. Prec. 264. pl. 215. Mich. 1706. *Bowdler v. Smith*.

9. A. devised lands to B. in tail, remainder over, and gives *power to his executor to raise 500 l. out of his estate for his next heir, if the executor shall think it necessary, and desires him to see his debts paid*, and gives to his executor all the *rest and residue* of his estate unbequeathed, to pay and distribute as he shall think fit. Per Commissioners, the executor has power to *sell* the lands, and the real estate by the will is subjected to the payment of debts. 2 Vern. 153. pl. 149. Trin. 1690. *Wareham v. Brown*.

10. Decreed by Somers, ld. chancellor, that *where a real estate is upon an equitable title made subject by this court to the payment of debts*, and it appears that there is a *sufficient legal estate*, (i. e.) *goods and chattels to satisfy debts upon specialties*, for which the creditors may have remedy at law against the executor; in such case the *debts upon simple contract, for which there is no remedy at law, shall be first satisfied out of the equitable estate*. 3 Salk. 83. pl. 4. Hill. 1697. *Feverstone v. Scetle*.

11. A man devises a *legacy out of his land*, and died, leaving *sufficient assets* for the payment of all his debts and legacies. Per Holt, that legacy ought to be paid out of the land; for it is a charge on the land, and not on goods. Though Cowper, king's counsel, said, that in chancery, if it be not expressed that legacy should be paid out of land, and not out of goods, if there be sufficient assets they will charge them in case of inheritance; to which Holt answered, if chancery be meddling with wills, they ought to go according to law. 12 Mod. 342. Mich. 11 W. 3. Anon.

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12. B. in 1661, made his will, and amongst other legacies, *devise* an annuity of 20 l. per ann. to C. to be paid quarterly, and gives other legacies, and then has this clause, *all the rest of my real and personal estate, not before bequeathed, (my debts being paid,) I give to my brother D.* and makes him sole executor, and lord keeper held the lands were charged by B.'s will. Abr. Equ. Cases 74. Pasch. 1702. Quintine v. Yard.

Chan. Prec. 430. pl. 282. S. C. accordingly, and that since he does not devise his real or personal estate to any particular person for those purposes, the persons that come within that description must be supposed to be in his view, and it must be taken to be a devise for the benefit of legatees and creditors, preferable to any disposition whatsoever, either of his real or personal estate, and consequently both are made liable thereunto. — Gibb. Equ. Rep. 111. S. C. in totidem verbis with Chan. Prec.

13. A. devised to B. his heir at law, his lands for life, remainder to her issue, remainder over, but in the beginning of the will he says, *I will and devise, that my debts, legacies, and funerals, shall be paid in the first place.* A. makes B. executrix. Cowper C. decreed the real estate liable to the payment of debts, and said, that the directing the debts to be paid *in the first place imports*, that before any devise by his will should take effect, his debts, &c. should be paid, and seemed to lay some stress upon the word (*devise*). 2 Vern. 708. pl. 630. Hill. 1715. Trott v. Vernon.

Chan. Prec. 451. pl. 288. S. C. Ld. Chancellor was clear of opinion, that the personal estate was not liable in this case, and decreed according y. — Gibb. Equ. Rep. 125. Mainwright v. Bendloe, S. C. but seems to be only copied from Chan. Prec. — S. C. cited by Ld. C. Talbot, Cases in Equ. in Ld. Talbot's Time, 208. Trin. 1736. in case of Stapleton v. Colville.

14. A. *devise* his *fee-farm rent to be sold for the payment of his debts, and the surplus* arising by sale, after debts paid, he devised to his brother B. his heir at law, and to his brother C. and to his brother-in-law D. and willed his *household goods should go along with his house*, and devised the rest and residue of his *personal estate, to his sister E.* and made her executrix. The question was, whether the personal estate should be applied to the payment of debts in case of the fee-farm rent? Per lord chan. a difference is to be taken *where an estate is to be sold out and out for payment of debts, and where only the debts are charged on it*, and the estate made liable to the debts, and cited FELTHAM'S CASE, 1 Lev. 203. and the present case is the stronger, because the *surplus* arising by sale, after debts paid, is *not to go to the heir, but is devised away*; and besides, here the debts being great, the devise of the personal estate would come to nothing, which at law is deemed the worst construction that can be made of a will, and therefore decreed the debts should be paid in the first place, out of the money arising by sale of the fee-farm rents, and the personal estate only to come in aid of the fund, if deficient, and the surplus of the personal estate to the sister, the executrix. The devise of the rest and residue of the personal estate to her is to be understood what he had not otherwise devised by his will, viz. the household goods to go with the house, and not the residue after the debts paid. 2 Vern. 718. pl. 637. Mich. 1716. Wainright v. Bendlowes.

MS. Rep. Mich. 3 Geo. in Canc. Aubrey v. Middleton.

15. Case upon a will; it begins, *as to all my worldly estate, I give and dispose thereof in manner following, and then gives several pecuniary legacies, and several annuities for lives, to be paid by his executor, and then he devise* all the rest and residue of his goods and chattels, and estate, to his nephew Middleton, (*the defendant and heir*

heir at law to the testator) and makes him sole executor. The will was executed in the presence of three witnesses, with other circumstances required by the statute 29 Car. 2. of frauds to pass or charge lands. Note, there was an *express devise of some lands in the will to a relation of the testator*. The question was, if the real estate of the testator be chargeable with the legacies and annuities in default of the personal estate? It was insisted, that the real estate was not chargeable with the annuities and legacies, 1st, because no express charge upon the land; and, 2dly, no implied charge; because expressly declared by the testator, that the annuities and pecuniary legacies should be paid by his executor, which strongly implies the intent of the testator to be, that the annuities and legacies should be paid out of the personal estate, being directed to be paid by one, viz. his executor, who, as such, has nothing to do with the real estate; and though in this case, it happened that the executor was heir of the testator, yet that will not alter the case, but it is the same as if they were two distinct persons, because he *claims by two distinct titles*, viz. the land as heir at law, and not by the will, and the personal estate by the devise of all the rest and residue of his goods, chattels, and estate, and as executor; they likewise insisted, that the real estate of the testator did not pass to the executor by the devise of all the rest and residue of his goods, chattels, and estate, because the word estate follows and accompanies goods and chattels, and therefore shall be restrained and confined to that sort of estate which went before, viz. personal estate, though they admitted the word (estate) itself, or accompanied with other words which found in reality, would pass land in a will. Per Cowper C. the real estate of the testator is chargeable with the pecuniary legacies and annuities by the will. It was certainly the intent of the testator, that the annuities and legacies should be paid, and I will endeavour to support the plain and express intent. It is certain, from the whole frame of the will, that the testator meant to dispose of all his estate, both real and personal; for in the beginning of the will he says, as to all his worldly estate, he gives and disposes thereof; and afterwards does expressly devise part of his real estate, so that it is apparent he meant to dispose of his real, as well as personal estate, by his will; then comes the last clause, all the rest and residue of his goods, chattels, and estate, he gives to his executor; now the words (rest and residue) in this place, may have some stress laid upon them, and seem to refer to the introductory clause in the will, (as to all his worldly estate, &c.) which certainly extend to lands in a will, and will bear a larger construction by reference to the first clause, by which he intimates, that he intended to dispose of all his estate both real and personal, by his will, and therefore he was of opinion, that by the devise of all the rest and residue of his goods, chattels, and estate, all his lands do pass to his executor, and that he takes by the will, and not by descent as heir at law, and that the lands so devised to him are chargeable with the pecuniary le-

MS. Rep.
Mich.
3 Geo. in
Canc. Ld.
Henry Paw-
let & Ux. v.
Parry.

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gacies and annuities, if the personal estate falls short to satisfy the same, and decreed accordingly.

16. Mr. Parry having 5 sons and 2 daughters makes his will, which begins thus, viz. *As to my estate I dispose of it in manner following; and then he gives several specifick legacies to his children, and devises his lands to his eldest son Charles (the defendant) and to the heirs male of his body, remainder to his 2d son in tail male, and so on to his other 3 sons in tail male successively. He also devises several debts and chattel-interests to his eldest son Charles, and then he gives 1500 l. a-piece to his 2 daughters at 21 years of age, or day of marriage, to be paid by his said son Charles, and makes him sole executor.* The question was, if the real estate expressly devised to his son Charles in tail, with remainders over in tail male to his other sons, is chargeable with this portion of 1500 l. devised to the plaintiff, being directed by the will to be paid by his son Charles the first devisee in tail and executor. For the plaintiff was cited the case of *CLOUDESLEY v. PELHAM*, in Canc. 1686. The devise there was to trustees in tail, yet the court held that the lands were chargeable with payment of debts implicitly by that will. Per Cowper C. this is a very doubtful case; the lands are settled by this will upon the testator's sons successively in tail male, which makes it very different from the case of a devise in fee. Cases of this nature have been carried very far already in this court, to charge land by implication, out of an inclination in the court to make every part of the will take effect; and if there be precedents sufficient to warrant a charge upon lands, settled and intailed by the will, I shall be willing to do it now out of the same inclination. The lands are not directly and absolutely given to the defendant, who is directed by the will to pay the 1500 l. to the plaintiff, but only sub modo with limitations over to the other sons in tail male successively. Suppose the defendant, the first devisee in tail, and who is directed by the will to pay this 1500 l. to the plaintiff at her age of 21 years, or day of marriage, had died without issue before the 1500 l. had become payable, would this 1500 l. be a charge upon the estate tail of the 2d son who is next in remainder? I will take time to consider of this case, and in the mean while let the master take an account of the personal estate of the testator, and make an estimate of the quantum thereof at the time of making the will; for that may give some light to find out the meaning of the testator. It might then be sufficient to satisfy all debts and legacies, though since it may be insufficient by subsequent losses or accidents. *Curia advisare vult.*

17. *Legacies by will were charged on the land (viz.) charged with the payment of her legacies abovementioned.* The testatrix after gave other legacies by a codicil. It was objected, that these words could not extend to the legacies in the codicil, but admitted, that if the real estate had been *charged with the payment of the testatrix's legacies in general*, it would have taken in the legacies in the codicil, they being as much her legacies as the legacies in the will.

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Decreed the legacies by codicil chargeable only on the personal estate. Wms.'s Rep. 421. 423. Pasch. 1718. in case of Masters v. Sir Harcourt Masters.

18. A. made his will, and begun it thus, viz. *As to my worldly estate I dispose the same as follows; after my debts and legacies paid, &c.* and then gave several legacies, and also portions to his daughters; and then added, *after all my legacies paid, I give the residue of my personal estate to my son; and then he devised his fee-simple lands to his (only) son and his heirs, and if he dies without issue in the life of any of his daughters, then to his daughters; and ordered of interest to be paid by the executors for the daughters' portions, and made his son and J. S. executors.* The personal estate was near, but not fully, sufficient to pay all the portions. Ld. C. Macclesfield said, that as plain words are requisite to charge the estate of, as to disinherit, an heir. His lordship took notice of the interest being directed to be paid by the executors, and that the deficiency of the personal assets was not such as to leave the daughters destitute, and decreed the real estate not liable. 2 Wms.'s Rep. 187. Trin. 1723. Davis v. Gardiner.

At the end of this case, ibid. 190. is added a note, that if in this case there had been a want of assets for payment of A.'s debts, seems the lands would have been charged therewith by the first words. — A. by his will takes notice, that he had limited annuities to his eldest son and his wife for their lives, and then charges all his real estate with payment thereof; and afterwards he limits the manor of H. to C. his 2d son, in strict settlement, remainder to D. in like manner, and then devises to C. all other his estates, real and personal, whatsoever, and wheresoever, to him, his heirs, executors, administrators, and assigns, for ever. And farther, my will is, &c. that my said son B. shall pay all my debts, &c. and all legacies, &c. bequeathed by this my will. And then bequeathed to his younger children 2000 l. a-piece. A. died seised of no real estate but the manor of H. only. The question was, whether the estate devised in strict settlement was subject to the pay off younger children's portion? And Mr. J. Parker, who heard the cause for my Ld. Chancellor, was of opinion, that this real estate was chargeable, these portions being for younger children, who are considered as creditors in a court of equity; and in the case of creditors it has been held, that where a testator in the beginning of his will declares, that he is disposing of all his worldly estate, and then gives a direction that his debts shall be paid, the debts thereby become chargeable on the real estate as well as the personal; and as to an objection that A. had used proper words to charge his real estate with payment of the annuities, but had not in relation to these portions, and that therefore his intent was not the same, he said it was not conclusive; for a testator may use express words of charging in one part of his will, and may create a charge by implication in another part of it; and as to the objection that A. had made a different fund for payment of the legacies out of the residue of his real estate which he gave to C. he said, that if the fact was so, that there was any such residue, the argument would be good; but that there was no such residue in fact; and decreed accordingly. Barn. Chan. Rep. 86. Pasch. 1740. Webb. v. Webb.

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19. *As touching all such worldly estate which God hath blessed me with, I dispose of the same as follows: Imprimis, I will that all my just debts be paid and satisfied.* It was argued that it is a general preface to make a general disposition of his real and personal estate as is mentioned after in the will; that it is an independent clause, and means only an intention of a general disposition. He after devises his freehold and copyhold estate to his son and his heirs, when he comes to 21, paying his wife 100 l. a year for her dower in the mean time. After 100 l. per ann. to his wife for dower, the rest of the profits to be put out for benefit of all his children, but made no provision for debts. It was insisted that if a man devises lands after debts paid, that is a charge; but it was decreed that this is not a charge of debts upon the real estate. MS. Rep. Trin. 9 Geo. 1723, Barton v. Wilcocks.

20. The defendant was executor and devisee of the real estate of one Moore. The bill was to be paid 30 l. which the plaintiff had lent

lent to Moore, either out of the personal estate, if sufficient, or if not, then out of the real estate, for this reason, because upon lending of the money the title deeds of the real estate were put into the hands of the plaintiff, and it was indorsed upon them, that it was agreed that the deeds were so deposited, as a security for the payment of so much money, and the court declared the real estate in this case charged with the said debt. MS. Rep. Hill. 10 Geo. 1. 1723. *Atkinson v. Swift*.

27 July,
1739. Miles
v. Leigh.

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21. Testator, *seised in fee* of a farm, called *Hill's-Tenement*, in the county of Somerset, and of another called *Bowry-Hays in tail*, by will devised as follows, viz. As to all my worldly goods, I give all that tenement, called *Hill's-Tenement*, to my wife Joan for her life, and after her decease, then to my son Robert, and his heirs, for ever. Item, I give to my second son Henry 150 l. to be paid when Robert shall come into possession. Item, I give to my daughter Mary Leigh 150 l. to be paid in 12 months, at, and upon, the time that my son Robert shall come to, and enjoy the premises abovementioned; and in case my son Robert die before my wife Joan, my son Henry coming into possession, and surviving his said mother, shall pay to my daughter Mary Leigh the sum of 200 l. Item, all the rest and residue of my goods and chattels I give to my wife Joan, whom I appoint sole executrix of this my last will and testament. Robert and Henry both died in the life-time of Joan. Upon Joan's death, Henry, the son of Henry, the younger brother, enters on the premises. Mary brings her bill against him, to have her legacy of 150 l. or 200 l. out of the land, according to the directions of the will; but, upon consideration, the counsel for the plaintiff thought proper to waive their demand of the last legacy, and to insist rather upon the first. Mr. Greene for the plaintiff insisted, that this legacy was not *contingent*, but *absolute*, given to her immediately, though the time of payment was future, (viz.) when Robert should come into possession of the estate; that therefore the circumstance of Robert's and Henry's dying in the life-time of the mother, which the testator could not foresee, did not alter the case, or take away that which was already vested in her. 2dly, That this was a charge on the land, and if it was so in the hands of Robert, it must remain charged into whosoever hands it should afterwards come; nor is it in the power of the defendant (though he be heir at law, as grandson of the testator) to take advantage of his title by descent, and thereby avoid this incumbrance, but he is bound to take in this respect as a purchaser, i. e. *terram cum onere* in support of the intent of the testator. Indeed, the common rule is, that where a legacy is given generally, it is a charge on the personal estate, and there is no necessity of express words to subject that to the payment thereof; but here the personal estate is expressly discharged, because the testator has devised all that away to his wife, so that nothing remains here, whereout the legacy can be satisfied, but the land, and for this relied on 2 Vern. 228. *ALCOCK v. SPARHAWK*, where land in the hands of an executor, devisee, and heir at law, though not expressly charged, was yet made liable in

in aid of the personal estate; and on 2 Vern. 143. *ELLIOT v. HANCOCK*, where the land was charged with the payment of an annuity, though the executor, devisee thereof, was not heir at law; (but note, the master of the rolls said, that was a most absurd case.) Mr. Brown for the defendant said, that this was but a contingent legacy, to be paid upon Robert's coming into possession of the estate, which contingency never happening, consequently it is a *lapsed legacy*, and so with respect to the 200 l. which depended on the like contingency of Henry's coming into possession; for it does not appear, but that testator might foresee that his wife might survive both his sons, and then his not providing for his daughter in such case, can be attributed to nothing else but his want of intention so to do. 2dly, Admitting any legacy due, yet the plaintiff is not intitled to come upon the real estate, but must seek it out of the personal; and that such was the testator's intention, appears by his devising all the rest and residue of his estate to his wife, which words, *rest and residue*, necessarily imply, that something was before disposed out of it, which must be the 150 l. legacy, for there is nothing besides mentioned, and it does not appear that there were any debts owing to make any deduction; this is likewise the case of an heir at law, who is never to be prejudiced without express words; now here are no express words to charge him or the land, for it is not said by whom, or out of what the legacy is to be paid, but only, I charge so much to be paid when such a one shall come into possession, which is, indeed, a very general bequest of a legacy, and so falls entirely within the rule, that in such case the personal estate is to become liable; so, upon the whole, this legacy was but a personal charge upon Robert, which, at least, could affect his estate only while in his hands, and was lapsed by the death of him who was to pay it. The master of the rolls said, I take this to be a *charge on the real estate* in the hands of the heir. I say a charge; for if it were a condition, then the defendant, who is the heir at law, might safely commit a breach of it, there being nobody but himself to take advantage of it; that the real estate is charged I make no doubt, because it could never be the meaning of the testator, that the daughter should have 150 l. in case the estate went to his son, and, at the same time, that she should have nothing in case it went to his grandson; this would be a most *unnatural construction*, and yet such must be the consequence, if the legacy be considered merely as a personal legacy, and so lapsed by the death of Robert; and in this case the heir must take under the will; for though Robert and Henry were heirs to the testator, yet the devise to them, being with a charge, broke the descent, and though they never took in possession, yet it was a remainder, transmissible to the next person, who must take through them, and not as heir to the testator; and if the estate limited to Robert does not cease by his dying before he could take, so neither does the charge cease; and for the same reason, I think, the consideration, that the defendant is an heir at law, ought to be laid quite out of the case, because

because this is a *provision for a child*, and who otherwise will be left quite destitute, which will be another unnatural construction. As to the words *rest and residue of my goods and chattels*, I lay no great stress upon that argument, nor can it be concluded from thence, that any thing was before thereout disposed of, because these are words merely of course, and always inserted by the penner of the will, whether there be any precedent bequest or not, and, indeed, *are never improper*, because no executor can be said to take more than the residue, *it being impossible for a man to die without leaving some small debts behind him; or, if it could be so, the funeral expences must always be borne by the executor*. Decreed for the plaintiff, that the lands should be sold, and the 150*l.* paid to her with interest. At the rolls, 4 Nov. 1738, Miles v. Leigh. From this order the defendant appealed to the Ld. Chancellor, and for the appellant it was insisted, that the will being silent as to what fund the legacy should arise out of, and the land not being expressly charged, the *personal estate is the proper and natural fund*. That the time of payment, viz. *when Robert, &c.* could not denote an intention to charge the land with it, but merely the time of payment, and may reasonably be accounted for, viz. that as the mother, who was tenant for life of Hill's-Tenement, and devisee of the personal estate, might maintain her children out of the profits, during her life, so after her death, (when the eldest son should come to the land,) a provision might be made for the younger children out of the money; and that lastly, that by the other construction, this legacy of 150*l.* (together with the other legacy of 150*l.* to Henry, had he lived to take it, and which would equally be a charge) would *exhaust the whole devise* of Hill's-Tenement; and as to Bowry-Hays, testator had no power over it; and for a testator to mean, that a devisee should get nothing by the devise, is a strange presumption, and it is a necessary circumstance in the supplying the want of a copyhold surrender, that the heir at law be not disinherited. In 2 Vern. 568. FRENCH v. CHICHESTER, though the real estate was expressly charged with the payment of debts, yet the residuum being given to the wife, who was likewise made executrix, as here, the court held she must take it as executrix, and the personal estate, not being particularly exempted, was decreed to be applied in ease of the real. For the defendant in the appeal it was urged, that there is no need to say in express terms, that the legacy shall be paid out of the real estate, or by the heir, and that the smallness of the estate could be no argument to suppose the testator's intention was otherwise; for it would, at least, be as hard upon Henry, (who was to have the estate upon the death of Robert,) to pay 200*l.* to the plaintiff, which by the express words of the will he was to have done, out of this small estate, as for Robert, (or the defendant, his heir,) to pay only 150*l.* out of the very same estate. Ld. Chancellor; The first question is, whether this demand of the plaintiff is a charge upon the personal or real estate? The will itself is very ill penned, but upon the construction of it, (which must arise from

from the whole taken together,) I am of opinion, that it was originally and solely to arise out of the real estate. It is introduced, indeed, with the phrase (*all my worldly goods*), as if testator intended to say nothing of his land, either by way of disposition * or charge; but it is plain he meant by this, all his *estate of what kind soever*, for he presently after disposes of his real estate, and therefore used that expression with the same latitude that the civilians use the word (*bona*). Now the clause upon which the question arises, (item, *I give to my daughter Mary Leigh 150 l. to be paid in 12 months, at and upon the time that my son Robert shall come to and enjoy the premises abovementioned,*) amounts to, and must be construed, the same as if the testator had said (*he paying*); for the court often construes a clause as conditional, though there be no express words of condition, particularly adverbs of time, as the word (*when*), have been often considered as making a *condition or charge*, though there be no direction out of what estate, nor by whom the bequest shall be paid; and this construction will appear the better warranted, upon considering the clause relating to Henry's paying 200 l.; for as upon his coming to the estate, one of the legacies before charged, viz. that devised to himself, would be sunk, and, consequently, the estate become larger than it would have been in the hands of Robert, who was to have paid two legacies out of it; so the testator, probably upon this consideration, thought fit to make the plaintiff's legacy 200 l. instead of 150 l. (for that must be considered *not as a distinct, but an additional legacy,*) which manifests his intention, that whoever had the land, should pay the legacy, by his increasing the latter in proportion as the estate in the former was increased. As to the smallness of the estate, and that it will hardly pay the legacy, it will be no objection; for though the testator does not take upon him directly to charge the intailed land, yet I am of opinion his intent was to charge both, (for the words are, *when Robert shall come to the premises abovementioned*, which include, as well Bowry-Hays, as Hill's-Tenement;) that is, these bequests were *not made in respect of what estate he himself had a power to charge*, (which possibly might not be more than sufficient to satisfy them,) *but in respect of what estate would come*, whether by will or settlement to his eldest son. As to the devise of the residuum, there can be nothing drawn from thence, for there might have been debts, nor can any thing particular be inferred as to the propriety of the expression, it being as general and loose a phrase, as that of *all my worldly goods*, with which he begins his will, the first article of which is a devise of land. The 2d question is, whether this was a contingent legacy? and whether, if contingent, the contingency has happened? Now, I am of opinion, that the legacy was to take place not when Robert should *personally* take the estate, but *when the devise to Robert* (which was to him *and his heirs*) should take effect; and if it be a charge upon the real estate, it is immaterial whether Robert took or not; for by the devise the descent is broke, and the charge binds his heir, as well as him, *though he himself never took*

in possession; in the same manner as in the case of *MARKS v. MARKS*, where the condition was to have been performed by the ancestor, yet he dying before the time of performance, it was decreed to be done by the heir. Whereupon the decree pronounced by the master of the rolls was affirmed.

* (E) Where on the Personal Estate, and where on the Real, and on which first.

1. *A* Legacy was devised to pay debts and legacies. The *personal estate bequeathed to A.* shall not be subject or liable to the said debts or legacies. Ch. Rep. 45. in 6 Car. 1. *Peacock v. Glascock*.

2. *A.* indebted by judgment, and seised of lands liable, died intestate, leaving *B.* his wife and *C.* a son, infant, his heir. *B.* takes administration, and enters as guardian on the lands, and received the profits, and made *D.* executor, and charged it, and dies. *D.* entered as guardian, and possessed the personal estate of *A.* and *B.*—*C.* died. *D.* administered to *C.*—*E.* the heir of *C.* paid 200*l.* on the judgment. Per *Ld. Keeper*, the profits taken by the guardians should be liable to make satisfaction to *C.* but the personal estate in *B.*'s hand was liable first, in case of *E.* to which the administrator *de bonis non* is liable; though not being made a party he held the bill ill, but gave leave to amend in that point. 2 Ch. Cases, 197. Trin. 26 Car. 2. *Bressenden v. Deereets*.

3. Devise of leases, and other considerable personal estate in trust, to pay his wife 100*l.* per ann. during her life, in lieu and discharge of her dower. Decreed to issue out of the personal estate only, if that be sufficient free from taxes; but if that be not sufficient, then to be made good out of the real. Fin. Rep. 134. Mich. 26 Car. 2. *Lefquire v. Lefquire*.

4. Lands were settled for payment of legacies and debts, and after for performance of his will, and made his will at the same time, and in it he directed his trustees to pay certain legacies to his younger children, the surplus to his heir, and made his wife executrix, but did not give her thereby, in terms, the personal estate, and devised that the children legattees should release to his executrix all such actions and demands of his personal estate. Decreed per Finch C. that the personal estate be accounted for, in aid of the heir, for what he should be charged withal, not only as to the creditors, but as to the legacies. Chan. Cases, 296. Hill. 28 & 29 Car. 2. *Lord Grey v. Lady Grey & al.*

Fin. Rep. 338. Hill. 30 Car. 2. S. C. — S. C. cited Chan. Prec. 477. in case of *Howell v. Price*. — S. C. cited Arg. Cases in Equ. in *Ld. C. Talbot's Time*, 204. in case of *Stapleton v. Colville*.

5. An annuity was devised, and charged on that part of his estate that should remain unsold after his debts and legacies should be paid. Part was sold, and there was a surplus on that part. Decreed that the surplus of what was sold, as well as the rents of the

the other part unfold, should be both applied to the payment of this annuity; and what falls short, to be supplied out of the other part of the estate unfold, with costs. Fin. Rep. 459. Trin. 32 Car. 2. Coleman v. Coleman.

6. If lands are devised for payment of debts and legacies, and the residue of the personal estate is given to the executors after debts and legacies paid, the personal estate shall notwithstanding, as far as it will go, be applied to the payment of the debts, &c. and the land be charged no further than is necessary to make up the residue. 2 Vent. 349. Pasch. 32 Car. 2. Anon.

7. Devisee of land shall be unburthened of a debt lying on the land by the personal estate in the hands of the executor or administrator, and so shall a devisee of a mortgage. 2 Chan. Cases, 84. Hill. 33 & 34 Car. 2. Popley v. Popley. Vern. 36. pl. 35. Pockley v. Pockley, S. C. accordingly. S. P. where 500l. was due on a mortgage of the land devised. Fin. Rep. 401. Mich. 30 Car. 2. Starling v. the Drapers' Company.

8. A. by his will subjects both his real and personal estate to the payment of his debts. Decreed that the heir should pay the debts, or in default thereof the real estate to be sold, and liberty given to the heir to prosecute for the personal estate. MS. Tab. Appeals, 23 Feb. 1705. Slydolph v. Langhorn. [468]

9. An estate being considerably mortgaged was devised to A. and several specifick legacies were left to others. The surplus is not sufficient to discharge the debt. All the specifick legacies shall contribute towards the discharging the mortgage, before the mortgaged premises shall be affected; for the covenant to pay the money makes it a personal debt, and the real estate shall never be put in average with the personal. MS. Tab. Appeals, 1706. Warner v. Hayes.

10. A. conveyed all his lands in trust for payment of his debts and legacies, and by his will devised all his personal estate to his wife, yet the personal estate shall come in aid of the real. MS. Tab. cites Feb. 1707. French v. Chichester. S. C. cited by Ld. C. Talbot, Cases in Equ. in Ld. Talbot's Time,

209. Trin. 1736. in case of Stapleton v. Colville; but said, that unless he was acquainted with the particular circumstances of the case of French v. Chichester, wherein the book seems deficient, he could never form any judgment from it; since if the reason given in the book [viz. 2 Vern. 568.] for it be the only one, he could not say that it gave him intire satisfaction, nor could he lay any great stress upon it, and the rather because there is a plain difference at law between the bare making an executor, and the making him likewise legatee of the personal estate; for in the first instance, if the executor dies intestate before probate, the first representative of the testator is intitled to the administration; whereas in the latter, there being an express gift to him, he takes as legatee, and consequently upon his death his representative would be intitled to it, an interest being veited in him in his own right in the one case, but nothing at all in the other, until he hath converted it.

11. Bill to have a specifick performance of an agreement of a purchase of lands against the heir and executor of Crofts, to whom the lands were devised for payment of debts, &c. Crofts bill by the heir against the executor to account for the personal estate of the testator, to come in aid of the real estate devised to be sold for payments of debts, &c. Crofts the testator devised particular lands to his executors, to be sold for payment of all his proper debts, and makes A. and B. his executors. For the heir at law

were

were cited several cases, that where there are *no negative words in the will*, an express devise of all the personal estate to the executors doth not exempt the personal estate from payment of debts of the testator, though there be a devise of lands to be sold for payment of debts; as *LADY GAINSBOROUGH'S CASE* in dom. proc. *HUNGERFORD'S CASE* in dom. proc. *COOK v. MOOR* in dom. proc. *CHRIST'S HOSPITAL v. GARROWAY* in Canc. *HALE v. HALE* in Canc. tempore Cowper C. Decreed that the executors account for the personal estate of the testator, for that is liable to payment of debts in aid of the real estate; and since the personal estate is not sufficient to pay off the debts and mortgage, the lands must be sold, and the money raised by sale to pay the residue of the debts; and the surplus of the money raised by the sale, after the debts paid, to go to the heir; per Harcourt C. MS. Rep. Mich. 12 Ann. in canc. *Gale v. Crofts & al'*.

[469] 12. Tho. Davies being seised of lands in fee, in consideration of 300 l. by lease and release conveyed the said land to R. in fee, with a covenant for quiet possession, and also that the said land was free from all incumbrances; and in the said release there was a proviso, that if the said D. his heirs or assigns, should upon Michaelmas-day, which should be in the year of our Lord 1702, or at any other Michaelmas-day, pay the said 300 l. with the rents and arrears which should grow due for the same, it should be lawful for the said D. his heirs and assigns to enter; but the said release was without any covenant for payment of the 300 l. The said D. continued in possession, and paid the interest to R. as it became due. Afterwards D. upon his marriage settled the said land on his wife and the issue of that marriage, and covenanted that it was free from all incumbrances, except the said mortgage to R. Afterwards D. made his will, and thereby gave several legacies to the value of about 26 l. and all the rest of his goods and chattels he gave to his wife and daughter, whom he made his executrixes, and appointed them to pay his debts. D. died, leaving his said daughter, who was his only child. The daughter died within age, whereby the plaintiff became heir at law to D. and brought his bill against the defendant, formerly the wife of the said D. to have his personal estate (which amounted to 600 l. besides the legacy) applied in exoneration of the said land. The defendant's counsel insisted that it ought not to be applied in discharge of the land; 1st, Because the 300 l. was neither a debt in law nor equity; for where there is a debt, there is a method for the recovery of it; but in this case there was none, there being no covenant for the payment of it. 2dly, Because D. had charged his real estate alone with the payment of 300 l. and had disposed of his personal estate otherwise. 3dly, Because the *personal estate was given to the daughter who was heir at law*, whereby the demand of the aid of the personal estate was extinguished. But Cowper Ld. C. was clearly of opinion that the land was conveyed by D. to R. as a mortgage, because D. had by the proviso reserved to himself, his heirs or assigns, a power of redeeming, and had upon his marriage settled the land as his own, and in the covenant of that deed of

settlement called the land conveyed to R. a mortgage; and he was of opinion, that *the rent and arrears expressed in the proviso signified the interest of the 300 l.* and said, that the word (*rent*) taken in its largest sense, was not improperly used to denote interest. He was also of opinion that the 300 l. was a debt, wherewith the personal estate of D. was chargeable, though the mortgagee was restrained as to the recovery of it, for want of a covenant for payment of it; but that the mortgagor being in possession might have been ejected by the mortgagee, and if the mortgagee had been in possession the 300 l. would have been no less a debt upon his having a pledge in hand; and that D. appointing his executrixes to pay his debts, is a proof that he designed them to pay his debts in exoneration of the inheritance, for the redemption whereof he had reserved so large a power by the proviso; and as to *the personal estate being discharged by its being given to the heir at law*, he was of opinion it was not, because it *was given to her jointly with the wife*; for which reason he decreed that the personal estate should be applied to the exoneration of the real. Several precedents were cited, where only real estates were charged; and yet the personal estates given to others had been applied to the discharge of the real. MS. Rep. Mich. 4 Geo. Powel v. Price.

13. Wherever *assets are brought in exoneration*, there the debt originally charges the personalty. Arg. 9 Mod. 20. Mich. 9 Geo. 1. in Lady Coventry's case.

14. By the constant course of this court where debts by *specialty*, which are a *lien* at law on the real estate, are *discharged out of the personal assets* in case of the lands, then the *creditors by simple contract* shall stand in the place of the creditors by specialty, to have their debts satisfied out of the lands; and decreed accordingly, and that the lands be sold for that purpose, and the heir, an infant, to join in a conveyance within six months after he comes of age. 9 Mod. 151. Trin. 11 Geo. 1. Charles v. Andrews.

15. A. devised to his wife certain houses in bar of dower; and subje~~ct~~ to his legacies, devised to B. his eldest daughter and her heirs one moiety of his real estate, as also one moiety of his personal estate; and in the same words to C. his youngest daughter; and after bequeathed to J. N. his godson 500 l. part of 1000 l. owing to him by J. S. and the residue of the 1000 l. he gave among the brothers and sisters of J. N., &c. Afterwards A. mortgaged the said estate for 3000 l. It was contended that this mortgage, being a debt, must be paid out of the personal estate prior to the specifick legacies, or at least before the pecuniary legacies; and it was admitted by counsel on both sides, that the land being made by the testator himself a fund for payment of the mortgage-money, though the same should be eased against an administrator or residuary legatee, yet it should be eased so as not to disappoint any of the debts, or even legacies given by the will, either specifick or pecuniary. 2 Wms.'s Rep. 328, 329. 335. Hill. 1725. Rider v. Wager.

16. A

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16. A mortgage shall be paid out of the personal estate *in preference to the customary or orphanage part, by the custom of London*; Arg. said to have been determined, and the same was admitted by Ld. C. King, because the custom of London cannot take place till after the debts paid. 2 Wms.'s Rep. 335. Hill. 1725. in case of *Rider v. Wager*.

17. By marriage articles, A. *covenanted to settle all his lands in B. within 6 months after request*, to the use of himself for life; remainder to trustees to preserve, &c. remainder to his wife for life, remainder to the 1st, &c. son in tail male, *remainder to trustees for 500 years, to raise 5000 l. for daughters' portions payable at 18 or marriage*. A. covenanted that the lands (which were but 366 l. a year) were 500 l. a year, and gave a bond of 8000 l. *for performance of articles*. The marriage took effect. The wife died, leaving only one child M. a daughter, no settlement being made. Afterwards A. married again, and settled the greatest part of the lands in B. without giving notice of the articles, and had issue B. a son, and E. a daughter. A. died intestate, leaving M. B. and E. living, and a personal estate of 20000 l. The master of the rolls held that this 5000 l. was not a debt due from the intestate, or to be paid out of his personal estate; for notwithstanding the bond, there is *no covenant for payment of the 5000 l.* but the covenant was to settle lands, and to raise a term of 500 years for securing the 5000 l. And that the want of making request, shall not prejudice the cestui que trust, and the rather, because she was an infant. And though the covenant had been absolute to settle within 6 months, and likewise a covenant to pay the 5000 l. yet resort should be to the land first, and afterwards in case of deficiency to the personal estate; for the articles to settle particular lands, are in equity a settlement, and A. from that time became a trustee for the trusts in the articles, and is not like a mortgage, where the land is only a pledge for the money borrowed. But the land actually settled by A. on his 2d marriage without notice, (though it was a breach of trust in A.) shall not be liable to the articles. 2 Wms.'s Rep. 437. Hill. 1727. *Edwards v. Freeman*.

18. A. *tenant for life*, remainder to B. *his son in tail expectant* on death of A.'s wife as to part, and as to other part, expectant on the death of A. *charges by will the reversion in fee of all the estate, with payment of his debts*. The personal estate was very deficient. A. dies, living the wife. B. attained his age of 21 and levied a fine to the use of himself and his heirs, and *after B. had received the rents of the surplus of estate, not in jointure, for 2 years, he died intestate and unmarried*. The estate descended to W. R. and his mother administered to B. It was insisted that by the fine levied by B. the estate tail was extinguished and consolidated with the reversion or remainder in fee in W. R. and that the plaintiffs, the creditors, title to demand their debts then attached upon the estate, and cited 1 Salk. 333. *SIMMONDS v. CUDMORE*, and therefore that the rents and profits received by B. should be applied towards satisfaction of the creditors, and by consequence

consequence that the wife being plaintiff and administratrix to B. had assets in her own hands. But the court held clearly that the *rents and profits received by B. of his own estate*, whereof he was then owner, *should not be applicable to satisfy creditors till a demand made*, because till then he did no wrong in receiving the rents and profits of his own estate. Equ. Abr. 140, 141. Mich. 1728. Countess of Warwick v. Edwards.—And cites as lately decreed in case of Mountague v. Bord.

19. The testator devises *as to all his worldly estate, that his debts be paid within a year after his decease*; and then devises his *real estate to trustees for a term in trust for his wife for life, remainder to his sons successively in tail male*, and gives several legacies; per Ld. Chancellor, the real estate is chargeable with the debts, in case the personal estate be deficient. Cases in Equ. in Ld. Talbot's Time, 110. Trin. 1735. Hatton v. Nichol.

(F) Apportioned. In what Cases.

1. **B.** Had issue C. a son by the 1st venter, and D. and E. 2 sons and 6 daughters by his 2d wife, and settles land on D. in tail male, remainder to E. remainder to C. his eldest son by his first wife, provided that *if the land come to his eldest son, that he or his heirs should pay 1000l. to testator's daughters within 4 months after the estate should come to them*; and in default, the trustees to enter and raise the money. C. dies, leaving F. a son. D. and E. died without issue, but one of them suffered a *recovery of the moiety of the lands*, so that *a moiety only comes to B.* the mother having a moiety in jointure to her, and made no surrender thereof; per cur. the 1000l. is a legal subsisting charge, and the daughters claim not under, but paramount, the son that suffered the common recovery; and though the estate never came to C. the eldest son, and only a moiety came to F. his son, yet there must be no apportionment, but the daughters are intitled to the whole 1000l. 2 Vern. 359. pl. 324. Mich. 1698. Hooley v. Booth.

See tit. Apportionment (A)

(G) Charge. When discharged.

1. **LANDS** devised to be sold for payment of legacies of 200l. and 300l. devisee sold for 500l. and he having enjoyed the lands six years, and his vendee 22 years, in all 28 years *without any demand*, it was decreed against the legatees and their bill dismissed. Fin. R. 316. Mich. 29 Car. 2. Cusse v. Ash.

2. A. devised lands to, &c. and says, *if C. or his heirs shall enjoy the lands*, then he or they shall, in respect thereof, pay 200l. to a charity, &c. and the 200l. to be paid within 21 years after they come into possession. The lands came to the possession of C. who enjoyed

them several years, and then sold them to D. who had *quiet possession 40 years before the demand, but had notice* of the charge; per Ld. Chan. had this been a rent-charge, it would have been always chargeable on the land, but this is of a *sum in gross*, to be paid together and at one time; but directed to amend the bill, if plaintiff would, and make the executors, &c. * parties, who perhaps may have paid the money. Fin. R. 336. Hill. 30 Car. 2. Attorney-general, for Ashford parish in Kent, v. Twisden.

3. The father on marriage charges lands with payment of daughters portions, has a daughter and devised the land to a nephew. The daughter marries J. S. They *release* the portion to the nephew, and the nephew *covenants that it is in trust* for the husband and wife, and to continue the money in his hands at interest, or place it out on security. The nephew *sells the lands with notice* of the original charge. Decreed that the lands are still liable to the portion. 2 Ch. R. 173. 31 Car. 2. Tucker v. Searle.

4. A. by will gives 3000 l. to his younger children, secured by mortgage from B. and declares, that if his eldest son does not pay this 3000 l. then his lands shall go to his younger children. B. brings a bill to redeem and to pay in his mortgage money; there is a decree, and B. pays it in pursuant, the master puts it out on a bad security, the eldest son shall not be compelled to pay it over again to the younger children. Vern. 336. pl. 331. Mich. 1685. Oldfield v. Oldfield.

So where a devise of lands is to trustees and their heirs, for payment

5. If a lease be made in trust to pay debts, and after the lessor dies, the heir paying the debts shall be relieved against the lease and set it aside; per Ld. Chan. 2 Chan. Cases, 172. Hill. 1 Jac. 2. in case of Bodmin v. Vandebenden.

of debts and legacies, there is a resulting trust for the heir, and he may properly come into court and offer to pay the debts and legacies, and pray a conveyance of the whole estate to him; for the devisees are only trustees for testator to pay his debts and legacies. 9 Mod. 171. Roper v. Radcliff, in dom. proc.——— So of a residuary legatee. Ibid.

6. When the lands of the heir are charged for payment of portions to infants at 21 or marriage, they shall not be discharged before that time, nor shall a real security for infants portions be turned into a personal security where the lands are originally charged; but where the lands are only supplementally charged, it is otherwise; per Jefferies C. Vern. 338. pl. 331. Mich. 1685. Oldfield v. Oldfield.

But where the deed expressly provided that the term was to cease on the money being raised; it was held that the land was discharged. Ibid. cites Goddard v. Bowman.

7. Land was conveyed to J. S. in trust to raise and pay 500 l. to B. the trustee enters and raised the 500 l. and afterwards becomes insolvent, but before he became so, B. took a judgment from him to pay the 500 l. when raised. The words being to raise and pay, the master of the rolls doubted, and took time to consider, and would look into the trust-deed and defeasance of the judgment. 2 Vern. 85. pl. 82. Mich. 1688. Harrison v. Cage.

8. Grand-father tenant for life, remainder to his first son in tail, remainder over with power to charge the estate with annuity of

of 250 l. per ann. for 4 years. He charged the premises with 250 l. per ann. for 4 years to begin after the decease in *trust to raise* 1000 l. part to be paid to A. and the other part to the plaintiff B. and dies. The son pays A. his part. A. delivers up the deeds, and they are suppressed. The son takes the profits for 4 years and more, and leaves a daughter his heir at law, but no personal assets; per Lds. Commissioners, the lands shall be *liable in the hands of the daughter, though the 4 years are expired*, and though the person is dead that received those profits and should have paid the money in question. 2 Vern. R. 178. pl. 162. Mich. 1690. *Smith v. Smith & Holt & al'*.

9. Even at law, if the *heir took the profits* which should be applied for payments of debts, the lands shall still remain charged therewith; per Lds. Commissioners. 2 Vern. 181. in pl. 162. Mich. 1690. cites *Corbert's case*, 4 Rep. 81. b. 82.

10. A. devised to M. his daughter 500 l. and then devised to B. his son and his heirs an advowson, *on condition that B. give bond to pay M. this legacy of 500 l. according to his will*. B. died in the life of A. Per cur. this is a good equitable charge subsisting, notwithstanding the death of B. For if he had been living, and had refused to give bond for the payment of the 500 l. as directed by will, the advowson should be chargeable. N. Ch. R. 175. Mich. 1691. *Webb v. Sutton*.

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11. A. devised the *rents and profits of his lands till B. attain 21, or marry, towards payment of his debts; and if B. die before 21, or without issue, my debts being paid*, then he devised the same to *J. S. in tail*, he paying 100 l. to C.—B. dies before 21, without issue. The profits to the time that B. would have been 21, would not be sufficient to pay the debts. It was decreed per 2 lords commissioners, Rawlinson and Hutchins, that the profits should be liable to payment of the debts beyond the age of 21, till the debts should be paid. But Ld. Rawlinson held that was only by reason of the last words; but Ld. Hutchins held that it would be the same without them. Chan. Prec. 34. pl. 36. Mich. 1691. *Martin v. Woodgate*.

12. By *descent of the inheritance* of lands, out of which a *term for 500 years* was created for raising a portion of 5000 l. for A. on whom the inheritance descended, who died under 21 unmarried, the land is not discharged; but the 5000 l. remains still a subsisting charge on the estate; per Somers C. and affirmed in dom. proc. 2 Vern. 348. pl. 320. Hill. 1697. *Thomas v. Keymish*.

2 Freem.
Rep. 207.
pl. 282.
S. C.

13. A. devised an *annuity of 100 l. per ann. to B. for life*, to be issuing out of the *rents and profits of Bl. Acre*, with clause of distress; and devised *Wh. Acre, and also Bl. Acre, charged with the said annuity to C. and his heirs*. The *lands charged were but 50 l. per ann.* and B. had entered and taken the profits during his life, and devised the *arrears to M.* And it was decreed for M. For the intent was that B. should have 100 l. per ann. And a devise of the rents, or of the profits of lands, is a devise of the lands themselves, and the court will decree a sale where lands are charged to raise portions, and the profits will not do it; and the devise of

Bl. Acre, *charged with the annuity*, charges it in his hands by the said words; for it could not be charged before. Chan. Prec. 122. pl. 106. Mich. 1700. Foster v. Foster.

14. *Interest-money of a mortgage secured by bond*, is only a further security, and does not discharge the land; per master of the rolls. Chan. Prec. 132. pl. 116. Mich. 1700. Barret v. Wells.

A. devised that his executors should receive the profit of his whole real

15. Where *lands are devised to trustees to raise money* for several purposes, and *they raise it out of the profits*, the land is thereby discharged, and the persons concerned must resort to the trustees; per Ld. Keeper Wright. Chan. Prec. 143. pl. 124. Hill. 1700. Juxon v. Brian.

estate for payment of debts and legacies, and after those paid, he devised his estate to B. The executors misapplied the profits. Ld. C. Parker held that this uncertain interest should determine at such time as they might have paid the debts, &c. if they had duly applied the rents, &c. and only the executors are liable. Wms.'s Rep. 505. 518. Mich. 1718. Carter v. Barnardiston.

Chan. Prec. 162. pl. 134. S. C. decreed accordingly.

16. *Lands devised to trustees and their heirs to sell, and pay legacies*, and among the rest a *legacy to the heir* of 100 l. but no disposition is made of the surplus. Per cur. no more shall be sold than is necessary for payment of the legacies, and the heir shall have the surplus. 2 Vern. 425. pl. 386. Pasch. 1701. Randall v. Bookey.

17. 3000 l. to be raised out of land by virtue of a power to A. and a lease raised to trustees for that purpose was *assigned to new trustees for a collateral security of a lease for 99 years made by A. and that the said trust should remain during the term*. A. bequeathed the 3000 l. to M. his daughter, subject to the said collateral trust. [474] And per Ld. Wright, if the 3000 l. had been made a *collateral security generally*, the court would *discharge in reasonable time*, as here in 7 years time, if the party did not shew probable cause of *fear of eviction*, and shew by whom; but this being expressly ordered to continue, they could not do it; and decreed 3000 l. to the trustee of the lessee to stand his security, to be laid out at interest on such security as the master should approve of, liable to the lady's claim, in case there should be no eviction. 12 Mod. 614. cited per Holt Ch. J. Hill. 13 W. 3. as Lord Cornwallis's case.

18. In a marriage-settlement the *term raised for daughters portions at their ages of 17*, provided that *if the said A. should have issue male upon the body of the said M. that should attain the age of 21, or should marry, or if the said A. shall have no daughters*, or if the person inheritable shall pay off the portions intended to be raised, the term shall cease. It happened that *A. had a son that attained the age of 21*. Decreed, that the term cease, and the daughters lost their portions; though it was urged that the meaning must be, that if he had a son he should not pay till he arrived at 21 years, which was enough in favour of the heir. MS. Tab. Feb. 12, 1706. Colt v. Arnold.

19. A. made a *lease for 21 years to B. for payment of his debts and legacies*; and by a will made at the same time, reciting that he had made such lease, *devised the lands after the expiration of the said lease to C. who was his heir*, and made B. executor. A. lived

12 years

12 years after, and paid the debts himself, and the personal estate was sufficient for the legacies. C. brought a bill for an account of the profits, and the lease to be delivered up, *the trust being performed*; but Ld. Keeper Wright thought he had no equity, and that the *reversion only was devised* after the expiration of the said lease. Chan. Prec. 218. pl. 178. Pasch. 1703. Bushnell v. Parsons.

20. A. pursuant to marriage-articles, settled lands on himself for life, remainder to his wife for life, remainder to the first, &c. son, &c. remainder to trustees for 120 years to raise 1500 l. for daughters on failure of issue male, remainder to himself in fee. The trust of the term was declared to be to raise the 1500 l. out of the rents and profits; as well by leasing for 1, 2, or 3 lives, or any number of years determinable thereon, or for 21 years absolutely at the old rent. There was only one child, viz. a daughter named M. [and it seems that the wife was dead, though not mentioned.] Afterwards A. settled the reversion expectant on his own death without issue male, subject to the 120 years term, in trustees for 10 years, remainder to B. his nephew for life, remainder to his first, &c. son in tail male, remainder to C. grandson of A. and son of M. in tail male, remainder to himself in fee. The 10 years term was, that if M. and her husband would release the 1500 l. then the trustees should raise 1900 l. viz. 1500 l. to be vested in land for the benefit of M. and her husband, and the other 400 l. to be paid to the husband himself. A. died without issue, leaving C. his executor, M.'s 1500 l. not being paid. B. entered and enjoyed for 4 years, the portion not yet paid. The surviving trustee died, to whom M. administered, and then M. and her husband and B. assigned the 120 years term to J. S. who advanced the 1500 l. B. enjoyed the land 7 years, and died without issue male, leaving no assets. The question was, whether the money could be raised by mortgage, or any other way by the words of the trust, than by leasing or by the annual profits? Ld. C. Macclesfield said, that here was no time appointed for raising this portion, and therefore is due when the profits can raise it, and it carries no interest; but when the sum of 1500 l. is, or might have been, raised by the profits, then it becomes due, and the land is discharged as having borne its burthen; that the profits received by B. are as received by J. S. the mortgagee, because it is said in the last clause in the mortgage deed, that it should be lawful for B. to take the profits without account until default of payment; so that by this clause B. was tenant at will to the mortgagee, which makes it all one as if J. S. had let it to any other person, and so not pursuant to the trust, and so much as has been received of the profits must go towards the payment and sinking of the portion only, here having been a power of leasing, and the intention having been to charge the land as far as may be, 2 Wms.'s Rep. 13 to 21. Pasch. 1722. Ivy v. Gilbert,

Chan. Prec. 583. S. C. — This decree was afterwards affirmed in the house of lords, though the reporter says it was thought a very hard case. 2 Wms.'s Rep. 21. at the end of S. C.

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(H) Sunk by Perception of Profits.

1. **E**Dward Loyd, on his marriage, settled several lands to the use of himself for life, as to part to his wife for jointure, remainder to first and other sons of that marriage, and in default of issue male to the daughter and daughters of that marriage, and their heirs, until the remainder-man, to whom the estate was to go, according to the limitations of that settlement, should pay and satisfy unto the daughter 3000 l. remainder to the heirs of his body, &c. He had issue a son by that marriage, and 4 daughters. The son died in the life-time of Edward Loyd, leaving a daughter. E. L. afterwards suffered a common recovery, and made a settlement upon that marriage, and thereby charged the premises with other lands with the raising 3000 l. more. The daughters entered. The plaintiffs were creditors by judgment, and their bill was to be let into a satisfaction, subject to those charges of 3000 l. and 3000 l. and in exoneration thereof, to have an account of the rents and profits. Decreed at the rolls, that they should account for the profits, and that the rents should be applied first to pay the interest, and then to sink the principal, as in case of a common mortgage; and this decree was affirmed by the ld. chancellor, with this variation, that the principal should not be sunk till a third part was raised, above the interest, and so again not to sink the principal till another 1000 l. be raised. 2 Vern. 523. pl. 473. Mich. 1705. and ibid. 576. pl. 521. Hill. 1706. Blagrove v. Clunn.

(I) Good or not. In respect of the Possession, &c. or want of Possession, &c. in the Person charging it.

1. **I**T was agreed that he in reversion may charge it, and shall take effect after the death of tenant for life; contrary of a patron. Br. Charge, pl. 11. cites 38 E. 3. 4.

2. A man leased land for term of years, and after granted a rent-charge extra terram illam of 20 s. per ann. The termor shall hold it discharged; but if the termor surrendered to him in reversion who charged, there he shall hold charged, though 20 years of the term be to come; for the surrender made the lessor in, as if no term had been; by the best opinion. Br. Charge, pl. 10. cites 5 H. 5. 8.

[476] 3. If land is leased to one for life, the remainder in tail, remainder to the heirs of the tenant for life, and the tenant for life grants a rent-charge in fee, and dies, and the tenant in tail dies without issue, the heir of the tenant for life shall hold the land charged. Br. Charge, pl. 36. cites 5 E. 4. 2.

4. A man *leased for life*, and granted the reversion or *remainder over to J. N. who charged the land and died*, and the *tenant for life is heir to him to the fee*, he shall hold discharged; for *he hath the possession by purchase, though he hath the fee by descent*, and yet the franktenement is extinct in the fee. *Quære.* Br. Charge, pl. 16. cites 9 E. 4. 18.

5. A man cannot grant or *charge that which he hath not*. Perk. f. 65.

6. *And therefore if a man grants a rent-charge out of the manor of Dale*, and in truth he hath not any thing in the manor of Dale, and *after he purchases the manor of Dale*, yet he shall hold it discharged. Perk. f. 65.

7. Also a man cannot *charge a right*, for it shall be a good plea for him to say against such grant by master in fait, that he had not any thing in the land at the time of the grant; but in such case if the grants had been by *fine executory*, the law is contrary, Perk. f. 65.

For more of Charge in general, see Contribution, Debts, Executors, Grants, Jointenant, Mortgage, Rent, and other proper titles.

Charitable Uses.

(A) By the Statute of 43 Eliz.

1. 43 Eliz. cap. 4. *Whereas lands, tenements, rents, annuities, profits, hereditaments, goods and stocks of money have been given, * limited, appointed, and assigned for relief of aged, impotent and poor people, for maintenance of sick maimed soldiers and mariners, † schools of learning, free-schools, and scholars in universities, for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, for education and preferment of orphans, for stock or maintenance of houses of correction, for marriages of poor maids, for help of young tradesmen, handicraftsmen, and persons decayed, and for relief or redemption of prisoners, and for aid of poor inhabitants, concerning payments of fifteenths, setting out of soldiers, and other taxes, which lands, hereditaments, goods and stocks have not been employed according to the charitable intent of the givers;* † A school, unless it be a free-school, is not a charity within the provision of the statute of Q. Eliz. and consequently the inhabitants have not a right to sue in the attorney-general's name. 2 Vern. 387. pl. 355.

Mich. 1700. Attorney-General, at the relation of the Inhabitants of Clapham, v. Hewer.

* These words (limited, appointed, and assigned) are very material words, though omitted in the Abridgments of the Statutes; and as to constructions upon them, see letter (B).

* Concerning these commissions, these 6 things are to be observed. First, The number must be 4 or more. 2dly, The commissioners to be the bishop and chancellor of that diocese (if there be a bishop), and other persons of good and sound behaviour. 3dly, In that commission, any 4 of them do suffice to

For remedy whereof it shall be lawful for the lord chancellor, and for the chancellor of the dutchy for lands within the county palatine of Lancaster, to award * commissions to the bishop of every several diocese and his chancellor, and to other persons, authorizing them, or any four of them, to enquire as well by the oaths of 12 men of the † county, as by all other lawful ways, of all such gifts aforesaid, and of the abuses, breaches of trust, negligences, mis-employments, not employing, concealing, defrauding, mis-converting, or mis-government of any lands, goods or stock given for any the charitable uses before rehearsed; and the commissioners upon calling the parties interested, shall make enquiry by the oaths of 12 of the county (whereunto the parties interested may take their challenges), and upon such enquiry set down such orders, judgments and decrees as the said lands, goods and stocks may be duly employed for such charitable uses for which they were given; which orders, &c. not being repugnant to the orders, statutes or decrees of the donors, shall stand good, and shall be executed until the same be altered by the lord chancellor, or the chancellor of the county palatine of Lancaster respectively, upon complaint by any party grieved.

make orders and decrees, for therein none is of the quorum. 4thly, None shall be commissioners that have any part of the lands, &c. or goods or chattles, money or stocks, in question. 5thly, The commission is to limit a certain time, within which the commissioners are to order, decree, and certify. 6thly, Their authority is to inquire as well by the oath of 12 lawful men or more, as by all other good ways and means. 2 Inst. 710.

And the commissioners have power also to enquire of these 9 things. 1st, Of abuses. 2dly, Breaches of trust. 3dly, Negligences. 4thly, Mis-employments. 5thly, Not employing. 6thly, Concealing. 7thly, Defrauding. 8thly, Misconverting. 9thly, Mis-government of any lands, tenements, &c. goods, money, &c. given to any of the charitable uses aforesaid. 2 Inst. 711.

† Lands in Gray's-inn-lane were given to build a school at Rugby in Warwickshire. The commissioners sat at Rugby to inquire, and held not good. Toth. 92. 2 Jac. Rugby School's case. — Duke's Char. Uses, 80. pl. 24. S. C. upon breach of the trust, a commission was taken out in Warwickshire, to enquire of this gift; and by a jury there, the gift and breach of trust was found, and a decree made by the commissioners in that county, to settle the lands according to the donor's will; and upon an appeal the decree was reversed; for the inquisition and decree was not made, nor found by jurors, and commissioners of the county where the lands given to such uses do lie. The words of the statute are, to enquire by the oaths of 12 men or more of the county, of such gifts, limitations, and appointments, and of the breaches of trust of such lands or goods, &c. which is intended to be by jury and commissioners of that county where the lands do lie. — Ibid. 118. pl. 2. S. P. — See ibid. 126. pl. 36. S. P.

This act does not extend to all lands, &c. nor to all goods and chattles, money or stocks given to any of the charitable uses aforesaid; but

2. S. 2. This act shall not extend to any lands, goods or stocks given to any college, hall, or house of learning within the universities, and to the colleges of Westminster, Eton or Winchester, or to any cathedral or collegiate church.

3. S. 3. This act shall not extend to any city or town corporate, or to any lands or tenements given to the use aforesaid, within any such city or town corporate, where there are governors appointed, neither to any college, hospital, or free-school, which have † special visitors, governors, or overseers appointed by their founders.

certain are excepted in these 8 several cases, viz. 1st, Of the colleges, halls, or houses of learning, in either of the universities. 2dly, Of the college of Westminster. 3dly, Of the college of Eton. 4thly, Of the college of Winchester. 5thly, Of any city or town corporate, where there is a special governor or governors of such lands, &c. 6thly, Of any college, hospital, or free-school, which have special visitors or governors, or overseers appointed to them by their founders. 2 Inst. 711.

† If land is given to a corporation, or other particular persons, to perform a charitable use, and the donor appoints them visitors also of the use according to his intent; if the said visitors do break the trust, either in detaining part of the revenue, mis-employing, or any other ways defrauding, the charitable use;

use; this may be restored by decree of the commissioners, notwithstanding the statute of 43 Elis. which disables commissioners to meddle with lands given to the charitable uses, where special visitors are appointed; for the intent of the statute is to disable commissioners to meddle with such a case, where the land is given to persons in trust to perform a charitable use, and the donor appoints special visitors to see those trustees to perform the use according to his intent; if the trustees defraud the trust, the commissioners cannot meddle, but the visitors are to perform it; but where the visitors are trustees also, there the commissioners may by their decree reform the abuse of the charitable use; resolved by Ld. Coventry. Duke's Char. Uses, 68, 69. pl. 6. Hill. 11 Car. Sutton Colefield's case.——Ibid. 124. pl. 26. S. C. in totidem verbis.

4. S. 4. *This act shall not be prejudicial to the jurisdiction of the ordinary.*

5. S. 5. *No persons that shall have any of the said lands, goods, or stocks, or shall pretend title thereunto, shall be named a commissioner or a juror, or shall serve in the same.*

6. S. 6. *Persons which shall purchase upon valuable consideration of money or land, any estate or interest in any lands, or chattles that shall be given to any the charitable uses above mentioned without fraud, having no notice of the same charitable use, shall not be impeached by decrees of the commissioners, and yet the commissioners may make decrees and orders for recompence to be made by any persons who being put in trust, or having notice of the charitable uses above mentioned, shall break the same trust, or defraud the same uses against the heirs, executors, or administrators, of them having equity.*

This act does not extend to lands of purchasers having these 3 qualities; 1st, for valuable consideration of money or land. 2dly, Without fraud or

covin. 3dly, Having no notice of the same charitable use. But albeit the commissioners cannot make any decree against any such purchasers, yet may they make decrees for recompence to be made by any person or persons, who being put in trust, or having notice of the charitable uses abovesaid, have or shall break the said trust, or defraud the same uses by any conveyance, gift, grant, lease, release, or conversion, against his or their heirs, executors, and administrators, having assets in law or equity, so far as the said assets will extend. 2 Inst. 711.

If lands be given to a charitable use, and to dispose of an overplus; if the purchaser had no notice, it cannot bind, but if rent issue out of land, the purchaser must pay it, but will not charge him to pay arrearages before purchase, nor lay it upon one, nor excuse the other. Toth. 95, 96. cites Mich. 14 Car. Peacock v. Tewel.——Duke of Char. Uses, 82. pl. 33. S. C.

Lands were charged by will with 200 l. to be paid within 2 years to a charity. T. after the devisor's death, purchased the land with notice of the charge, and after 40 years quiet enjoyment and a settlement made by the purchaser on his son's marriage, a demand was made of this 200 l. But because the executors or administrators of the devisor were not made parties, the Ld. Chancellor would not direct a trial at law upon the point of notice, nor make any decree; besides the demand was not in nature of a rent-charge, which will always be chargeable on the land, into whose hands soever the same shall come, but it was of a sum in gross to be paid together and at one time, and this land having been enjoyed by several persons since his will, it does not appear but that the money may be paid; and ordered that plaintiff be at liberty to amend his bill, and make proper parties, and to bring the cause to a hearing again as he should be advised. Fin. Rep. 336. Hill. 30 Car. 2. Attorney-General v. Twidlen.

7. S. 7. *This act shall not give power to any commissioners to make orders concerning any manors or hereditaments granted unto the queen, to king Henry the eighth, king Edward the sixth, or queen Mary. And yet if any such manors, or hereditaments, or any profits out of the same, have been given for any of the charitable uses before expressed, since the beginning of her majesty's reign, the commissioners may proceed to enquire and make orders and decrees according to this act, the last mentioned proviso notwithstanding.*

This act does not extend to lands of purchasers of lands, tenements and hereditaments, assured, conveyed, or

come to queen Elizabeth. H. 8 Ed. 6. or queen Mary, by act of parliament, surrender, exchange, relinquishment, escheat, attornment, conveyance, or otherwise. But if such manors, lands, &c. have since the beginning of queen Elizabeth's reign been given, &c. to any of the charitable uses before expressed, then this act doth extend to the same. 2 Inst. 711.

Concerning the certificate of the commissioners, these 4 things are

to be observed. 1st, That they certify their order and decree respectively, either into the court of chancery of England, or into the chancery of the county palatine of Lancaster, as the case shall require. 2dly, That it ought to be in parliament, under the hands and seals of the commissioners. 3dly, It must be within the time limited in the commission. 4thly, That the lord chancellor or lord keeper, and the said chancellor of the dutchy, shall, and may within their several jurisdictions, take such order for the due execution of all or any of the said judgments, decrees and orders so certified, as to either of them shall seem fit and convenient. 2 Inst. 711.

9. S. 9. The lord chancellor, and the chancellor of the dutchy, may take order for the due execution of the said decrees and orders.

In the remedy for the party grieved with such decrees so certified, these 5 things are to be considered. 1st, That he complain to the lord

10. S. 10. If, after any such certificate made, any persons shall find themselves grieved with any of the said orders or decrees, it shall be lawful for them to complain to the lord chancellor, or the chancellor of the dutchy, according to their several jurisdiction; and the said lord chancellor, or chancellor of the dutchy, may proceed to the examination, bearing, and determining thereof, and adnul, alter, or enlarge the said orders and decrees of the commissioners, according to the intent of the donors; and shall tax costs against such persons as shall complain without cause.

chancellor, or lord keeper, or to the chancellor of the dutchy, according to their several jurisdictions, for redress thereof; and this complaint is to be by bill. 2dly, Upon such complaint, first they shall respectively, by such course as to their wisdoms shall seem meetest, the circumstance of the case considered, proceed to the examination, bearing, and determining thereof; 2. Upon hearing thereof, shall or may adnul the whole (which rarely is done), diminish (in part) or enlarge (that is to confirm the former, and to enlarge the same by adding something thereunto) the judgment and decrees so certified. 3dly, As shall be thought to stand with equity and good conscience. 4thly, According to the true intent and meaning of the donors and founders thereof. 5thly, And shall and may tax and award good costs of suit by their discretion (respectively) against such persons as shall complain to them respectively without just and sufficient cause, of the orders, judgments, and decrees before mentioned. But this order being given and limited by act of parliament, no costs (if the order, judgment, or decree be adnulled, diminished, or enlarged) ought to be given to the party complaining. 2 Inst. 711, 712.

(B) Established, though the Conveyance was defective.

1. DEVISE *ecclesie Sancti Andree* de Holbourn. The parson shall take, and yet the church is not persona capax, but the intent appears. Pl. C. 523: b. Hill. 20 Eliz. in case of Welkden v. Elkington.

Duke's Char. Uses, 80. pl. 25. cites S. C.

2. A copybold may be charged with a charitable use. Toth. 92. 41 Eliz. Kensham's case.

Mo. 822, 823. pl. 1111. 12 Jac. in Canc. S. C.

3. Devise to a charity by a feme covert administratrix, was held good. 2 Vern. 454. cites Mo. 822. Damus's case.

A devise to the company of leather-

4. A devise of lands held in capite was made to the principal, fellows, and scholars of Jesus College in Oxford, to find a scholar of the

the blood of the testator from time to time. Upon a reference to Hobart Ch. J. and the Ch. Baron, they agreed that the devise was void in law, because the statute of wills did not allow devises to corporations in mortmain, yet they held it clearly within the relief of 43 Eliz. under the words (*limited and appointed*); and so it was decreed, that the college should enjoy it against the ward and his heirs; and they held also, that the proviso in the statute exempting colleges, is only intended to exempt them from being reformed by commission, but not to restrain gifts made to them. Hob. 183. Hill. 13 Jac. Flood's, alias Lloyd's, case.

fellers, London, for a charitable use, was held a good devise. Toth. 92. Trin. 5 Car. Heliam's case. — Duke's Char. Uses, 80. pl. 23. cites S. C. upon a decree by commissioners to settle the lands upon the company. An appeal was, and exception taken, for that the company of leatherfellers was a corporation, and the statute of wills does except devises of land to a corporation. But the decree was confirmed, there being many precedents for it.

for that the company of leatherfellers was a corporation, and the statute of wills does except devises of land to a corporation. But the decree was confirmed, there being many precedents for it.

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5. A will of *copyhold lands of inheritance* to A. and his heirs, *without any surrender* before or after the will, was decreed good by the stat. 43 El. 4. but per Ld. Chancellor, the lord of the copyhold shall have his duties always of *finer, heriots, &c.* of the heir or purchaser, in whose name the interest of the copyhold rests in law, and that *allowance* shall be made of it out of the charitable use. Mo. 890. pl. 1253. River's case.

S. C. cited 2 Vern. 454. Mich. 1703. pl. 416. — See S. C. in Duke, 74, 75, 76. — It has been generally held that

the statute 43 Eliz. supplies all defects of assurances, where the donor is of capacity to dispose, and has such an estate as is any ways devisable by him; and upon this ground it hath been held, that if a copyholder doth dispose of copyhold lands to a charitable use *without a surrender*, or if tenants in tail do convey land to a charitable use *without a fine*, or if a reversion be granted *without attornment or enrolment*, and divers other the like cases, yet these defects are supplied by the statute of 43 Eliz. because the donor had a disposing power of the estate, and this is a good limitation and appointment within this statute. Duke's Char. Uses, 84. pl. 40. Christ-Hospital v. Hawes.

6. If an infant, lunatic, or other person who has not capacity to dispose of an estate, shall grant to a charitable use, this defect is not supplied by the statute. Duke's Char. Uses, 85. pl. 40. in case of Christ's Hospital v. Hawes, cites it as resolved, Hob. 136. 15 Jac. in Collinson's case.

Duke's Char. Uses, 78. in pl. 17. cites S. C. — Ibid. 110. cites S. C.

& S. P. and adds *feme covert*. — Hob. 136. pl. 184. S. C.

7. C. 15 H. 8. devised a house in Eltham, in Kent, to L. his wife for life, and after her death to J. B. and others, *feoffees (as he called them) in the said house, to keep it in reparations, and to bestow the rest of the profits upon the reparations of certain highways there. C. and his wife are dead, and the house descended to O. R. an infant.* This case being in chancery, between the parishioners and R. was referred by the court to the Ld. Hobbard, and the Ld. Ch. B. Tanfield, who resolved it clearly, that though the devise was utterly void, yet it was within the words (*limited and appointed to charitable uses*;) otherwise if he were *one who had appointed what was not his own* to charitable uses. Hob. 136. pl. 184. Pasch. 15 Jac. Collinson's case.

Mo. 888. pl. 1251. Rolt's case, S. C. The question was, because this will was made before the stat. 32 H. 8. and the land not in use, whether it were a limitation, appointment, or assignment

within the stat. 43 Eliz. and that it was referred to Mountague Ch. J. and Hobart, who certifying that it was a limitation or appointment to a charitable use, to be relieved by the stat. 43 Eliz. cap. 4. the Ld. Chancellor confirmed the decree.

The charity of judges have carried several cases on the 43 Eliz. great lengths, and this occasioned the distinction between operating by will and by appointment, which surely the makers of the statute never thought

thought of; per *Ld. C. Cowper. Chan. Prec. 272. Mich. 1708. The Attorney-General for Sidney College v. Baines.*—*G. Equ. Rep. 5. S. C.*

8. If a man *conveys 2 parts of his lands which he held in capite*, for a valuable consideration, and then *devises the remaining 3d part to a charity*, this is void, and not helped by the statute; because, in the instant of his death, this 3d part descends to the heir, and he having disposed the other two parts, has no power by the common law, and is disabled by the statute of wills to devise the other part. *Duke's Char. Uses, 78. pl. 18. in 17 Jac. Ld. Mountague's case.*

9. If *tenant in tail* gives land to charitable uses, the issue is barred; for the saving in the stat. 39 Eliz. cap. 5. excludes him. *Arg. Godb. 309. Pasch. 21 Jac.*

Devise by tenant in tail to charitable uses was decreed to be a good appointment, though no fine was levied or recovery suffered. 2 Vern. 453. pl. 416. Mich. 1703. The Attorney-General and Pettifer v. Rye, Warwick, & al'.—And the remainder-man shall be bound by a settlement to charitable uses as well as the issue in tail, and a decree made by the commissioners was confirmed with costs. Chan. Prec. 16. Tay v. Slaughter.—The statute of 43 Eliz. herein restored the common law, and at common law was no fine or recovery. G. Equ. Rep. 45. Jenner v. Harper.—Chan. Prec. 391. Trin. 1714. S. C. & S. P.

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10. The testator being seised in fee of a *manor held in capite*, devised it to be sold by his executors, and that *part of the money arising by such sale should be paid to his wife, and part in several other legacies, and the residue to be bestowed in charitable uses.* Upon a reference to the justices of B. R. from the court of wards, the question was, whether this was a good conveyance within the stat. 43 Eliz. because there was *no disposition of the land to charitable uses, but only an appointment that the land should be sold, and the money divided as aforesaid*; and resolved that it was not. *Cro. C. 525. pl. 4. Hill. 14 Car. Ascoug's case.*

Arg. the statute of charitable uses.—Cro. C. 525. S. P.

11. A *feme covert makes a will of 30 s. per ann. to a charitable use, out of some of her own lands*; and though an award was made that it shall be paid, and bonds given to perform the same, yet the *heir is not bound to perform the same.* *Toth. 96. cites Trin. 15 Car. Bramble v. the Poor of Havering.*

12. *Money given to a parish generally, and not said to what use, decreed to the poor of the parish.* *Chan. Cases, 134, 135. Mich. 21 Car. 2. West, and the Churchwardens and Overseers of the Poor, &c. of Great Creaton, v. Knight.*

13. Where a devise was of lands to *Trinity College* in Cambridge, for the maintenance of a fellow there, and that *if any by cavil should hinder this devise, or that the same cannot go to the college by reason of the statute of mortmain, then he devised the same to R. N. and his heirs*; and upon an information exhibited against R. N. by the attorney-general to have this land established in the college, it was decreed accordingly, notwithstanding the said statute of mortmain, and the said clause in the will. *Lev. 284. Hill. 21 & 22 Car. 2. in canq. The King v. Newman,*

14. M.

14. M. devised 37 l. per ann. to charitable uses, out of the manor of W. which was held in capite. Exception was taken that the *manor being held in capite*, the testator could charge only 2 parts in 3 by his will, which would not amount to 37 l. a year. But the court held the whole chargeable by the will, by the stat. 43 Eliz. which was an enabling statute, and that the testator had only mistaken the manner of the conveyance; for had he done it by grant, it had been good for the whole, and being by will, the statute made it a good appointment for the whole in like manner. Nelf. Ch. Rep. 146. in 22 Car. 2. Higgins v. the Poor of Southampton.

3 Chan. Rep. 68. S. C. accordingly. — 2 Vern. 454. S. C. cited as decided good.

15. Though a charity was *precedent to the stat. 43 Eliz. cap. 4.* yet the statute subsequent had a retrospect, and would make it a good appointment, though it was not so before (but void). Chan. Cases, 195. Hill. 22 & 23 Car. 2. Smith v. Stowell.

16. A devise, void by *misnomer*, of a corporation, was supplied in equity as a good appointment of a charitable use. Chan. Cases, 267. Mich. 27 Car. 2. Anon.

Fin. Rep. 221. Platt v. St. John's College, Cambridge,

S. C. accordingly. — Duke, 77, 78. S. P. in S. C. pl. 16. — 2 Vern. 454. cited as the case of Platt v. St. John's College. — Duke's Char. Uses, 83. pl. 38. The mayor of London's case, S. P. held accordingly, where lands were devised to the mayor and chamberlain of London, instead of the mayor and commonalty; for it appears that he intended to give it to the corporation of London, and his intent shall be observed.

17. A. built an alms-house in L. and, during his life, gave 4 l. per ann. to 7 poor women of L. of 60 years of age, and after by his will gave 28 l. per ann. to be distributed equally between 7 poor women. Deceased, that this charity be *established for ever*, though the words do not fully direct it in succession, and the 7 poor women to be chosen out of L. only. Fin. R. 353. Pasch. 30 Car. 2. Attorney General for Lambeth Parish v. Whitchcott. [482]

18. A. devised a charity to the poor of B. in the county of C. which was a *mistake of the county* of C. for D. The court was of opinion, that since there was such a parish in the county of D., A. must mean that parish, because it appears he was born there, and that both he and his parents lived and died in that parish. Fin. R. 395. Mich. 30 Car. 2. Langenew Parish in Denbighshire, alias Owen, v. Bean & al'.

19. A rectory devised for the maintenance of a minister there, was devised to no certain person, and therefore void at common law, and nothing was mentioned concerning the nomination to it. Those to whom the estate came, appointed O. to be minister, and serve the cure. P. supposing a lapse to the crown, was presented, instituted, and inducted, as if the church had been void. (Note, the church was formerly appropriate to an abbey, and no vicar endowed, but, probably, was served by one of the monks, and this coming to the crown, by grant came to the testator.) It was urged, that here was a *pious use* wholly subject to this court, and that P. coming in by the ordinary, though he was not parson or vicar, was allowed by the bishop; and decreed accordingly that P. should have the tithes. 2 Chan. Cases, 31. Trin. 32 Car. 2. Perne v. Oldfield.

20. An

20. An impropriator devised to one that served the cure, and to all that should serve the cure after him, all the tithes, and other profits, &c. Though the curate was incapable to take by this devise in such manner, for want of being incorporate, and having succession, yet Ld. Chancellor Finch decreed, that the heir of the devisee should be seised in trust for the curate for the time being. 2 Vent. 349. Pasch. 32 Car. 2. Anon.

21. In case of *copyhold land* where there is a *surrender to the use of the will*, such a will will operate as an appointment; for the copyhold passes not by the will, but by the surrender. 2 Vern. 598. pl. 536. Mich. 1707. Att. Gen. v. Barnes & Ux. (the case of Sidney College in Cambridge.)

3 Chan.
Rep. 150.
S. C. alias
Dr. John-
son's case,
but Ld.

22. A will not executed in presence of three witnesses, being void as a will, cannot operate as an appointment within the 43 Eliz. 2 Vern. 597. Mich. 1707. Att. Gen. v. Barnes & Ux. (the case of Sidney College in Cambridge.)

Chancellor said, that it being a favourable case on the one side, and a charity on the other, he would consider further of it, and confer with the judges.

Devise of lands, not in writing, to charitable uses, or *without 3 witnesses*, is void; and the statute 43 El. 4. which favoured appointments to charities, is now repealed pro tanto, i. e. as to the want of 4 witnesses, by the *statute of frauds*, which requires 3 witnesses. 1 Salk. 163. pl. 3. Trin. 1714. in Canc. Jenner v. Harper.——Gilb. Equ. Rep. 44. S. C. in totidem verbis, only mistakes a citation out of Swinb. for Comb. and concludes, that Ld. Chancellor seemed to be of the same opinion, but said, he would consider of it till the first day of causes after the term, and in the mean time recommended it to the plaintiffs to make good the charity.

A nuncupative will of 20 l. per ann. out of lands to a charity, though before the *statute of frauds*, is not good as an appointment by the 43 Eliz. Ch. Prec. 389. Trin. 1714. Jenner v. Harper.——For at common law lands or a real estate were not devisable, and the statute of 32 H. 8. as much requires that a will of land should be in writing, as by the statute of frauds it is required that such a will should have 3 witnesses, and this being a devise of *rent*, which cannot pass without deed, is not good by nuncupative will. Wms.'s Rep. 248. Trin. 1714. S. C.——Wms.'s Rep. 248. the reporter makes a quere, and cites Duke's Charitable Uses, 81. STODDARD'S CASE, where one, before the statute of frauds, devised a rent of 10 l. a year out of lands to charitable uses, and willed the scrivener to put it in writing, which he did, and decreed that this nuncupative will was good; for though a rent cannot be created without deed, yet *rent* may be appointed without deed by the words of 43 Eliz. and though the nuncupative will be void as a will, yet it is good as an appointment; and the reporter says, it seems that 43 Eliz. which makes these appointments to charities good, being subsequent to 32 H. 8. of wills, supercedes and repeals that statute, but that it is true, that the statute of frauds being subsequent to 43 Eliz. repeals that, and therefore since the statute of frauds an appointment of lands to a charity by will not attested by 3 witnesses is void.

[483] 23. A wife having power to dispose of her personal estate, (which only comprehended the personal estate she had before marriage) and getting into possession, in a secret manner, after marriage, of a great personal estate at her father's death, conceals it from her husband, and afterwards by will disposes of it to charities; yet decreed, that what was so concealed shall not be made good to the husband, so as to disappoint the charities. MS. Tab. March 11, 1711. Pilkington v. Cuthbertson.

Gilb. Equ.
Rep. 137.
S. C. in to-
tidem verbis.

24. A settled lands, with power of revocation by writing executed under hand and seal in the presence of 3 witnesses, not being menial servants, and in her illness, by a letter, directed a deed of revocation to be prepared, but died before it was done, having by will left part to charitable uses, and decreed good as an appointment, though there was no revocation; per master of the rolls. Ch. Prec. 473. pl. 296. Pasch. 1717. Piggot v. Penrice.

25. The

25. The statutes supplies all defects of assurance where the donor is of capacity to dispose, and hath such an estate as is any way disposable by him, whether by fine or common recovery. 2 Vern. 755. pl. 660. Mich. 1717. in case of Att. Gen. v. Burdet.

Ibid. cites Duke's Char. Uses, 84. pl. 40. in case of Christ's Hospital v.

Hawes, S. P. where it is said, that upon this ground it has been held.

26. J. S. by will devised an annuity of 50*l.* a year, and also 100*l.* in money, to A. and his heirs, and if A. dies without heirs, then to a charity. A. died without issue in the life-time of J. S. the testator, and then J. S. died. It was argued, that the devise of the remainder ought to be supported, as given to a charity; but Ld. Chancellor said, that supposing it to be void if given to a common person, it shall be the same when given to a charity; that in this case the devise over is void, and the word (heirs) shall not be construed to signify heirs of the body where the devisee over is not inheritable; and the death of the first devisee in the life-time of the testator can make no alteration, if the will was void at the making. 2 Wms.'s Rep. 369. pl. 109. Trin. 1726. Att. Gen. v. Gill.

(C) Grant or Devise to Charitable Uses. Good in respect of the Words of the Gift, and the Persons to whom.

1. IF one devises land to J. S. for life, the remainder to the church of St. Andrew's in Holborn, the parson of the church shall have this remainder. Duke's Char. Uses. 113. cites 21 R. 2. Devise 17. [But it is not at Devise 17.]

2. A devise to the poor people maintained in the hospital in the parish of St. Lawrence in Reading for ever. Exception was taken, that the poor were not capable by that name, for no corporation, yet, because the plaintiff was capable to take lands in mortmain, and did govern the hospital, it was decreed the defendant should assure the lands to the mayor and burgessees for the maintenance of the said hospital. Toth. 94. cites 43 Eliz. Mayor and Burgessees of Reading v. Lane.

Duke's Char. Uses, 81. pl. 30. cites S. C.

3. Upon the will of one Hunt, of the lease of the rectory of H. in the county of W. it was resolved by Egerton and Popham, that a devise of money to be distributed to 20 of the poorest of his kindred, shall be * a good devise, notwithstanding it does not appear that he had any poor kindred. Toth. 92. cites 44 Eliz. Goff v. Webb.

Duke's Char. Uses, 80. pl. 27. cites S. C. accordingly. — Ibid. 212. S. P.

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4. A. being seised of copyhold lands in B. in Essex, did devise, that the parson and churchwardens in Thames-street, London, and 4 honest men of that parish, should sell the land, and employ the money for the poor, and charitable uses in that parish; and it was objected that the devise was void, because the parson and church-

Duke's Char. Uses, 81. pl. 28. cites S. C.

churchwardens were *not a corporation to take land out of London, not to sell it for such uses*; but it was decreed, that the devise was good, and that they had a good authority to sell the same. Toth. 92, 93. cites 3 Jac. *Champion v. Smith.*

Duke's
Char. Uses,
82. pl. 32.
cites S. C.

5. When *no use* is mentioned or directed in a deed, it shall be decreed to the use of the poor. Toth. 95. cites 10 Jac. *Fisher v. Hill.*

Sir Thomas
was then
treasurer of
the navy.
Toth. 94,
95. S. C.
and *though*
no certain
particular
men could
claim it, yet
he was ad-
judged to
account for
it by this
law.

6. The captain, mariners, and soldiers at sea made a voluntary constitution, that every mariner and sea-soldier should abate so much a month out of their pay, to be employed for the relief of the mariners and soldiers maimed or hurt in the service, of which abatement there was 300 l. and which had been in the hands of Sir Tho. Middleton above 20 years. The mariners procured a commission upon the statute of 43 Eliz. whereupon the commissioners finding the constitution and the retainer, Sir Thomas was decreed to pay the money to the said use; and upon exceptions exhibited by Sir Thomas, the Ld. Chancellor confirmed the decree. Mo. 889. pl. 1252. 15 Jac. *Middleton's case.*

———Duke's Char. Uses, 74. pl. 13. cites S. C.

Duke's
Char. Uses,
81. pl. 28.
cites S. C.

7. A. devised by parol a yearly rent of 10 l. for ever out of his house called the Swan with 2 Necks in the Old Jewry, London, for the maintenance of 2 scholars in Oxford and Cambridge; and willed that Hugh the scrivener should put it in writing, which he did accordingly; and this was found by inquisition, and decreed. And it was objected that the devise was not good, for that a rent could not be devised by a nuncupative will; but the decree was confirmed to be good; for a rent may be created and granted without deed in case of a pension, much more for a charitable use. Toth. 93. cites 20 Jac. *Stoddard's case.*

S. C. says it
was decreed
good in
chancery by
the words
(limited and appointed)

8. Lands given to church-wardens void in law. Decreed about 2 Car. Toth. 96. *Penniman v. Jennings.* And cites Mich. 14 Car. *Mansel v. Middleton.*

(limited and appointed) within the statute. Duke's Char. Uses, 82. pl. 34.

Duke's
Char. Uses,
80. pl. 26.
cites S. C.
accordingly.

9. Money was given for the good of the church of Dale, and this was ruled good upon these general words. Toth. 92. cites 4 Car. *Wingfield's case.*

———*Ibid.* 113. cites S. C. and says, that so by reason it will be in all such uncertain gifts. ———*Ibid.* 112. S. P.

Duke's
Char. Uses,
81. pl. 31.
cites S. C.

10. A. devised by his will monies to a charitable use, to be bestowed for poor people, and the residue of his goods to be employed to such uses as his feoffees shall think meet. The devise is good. Toth. 95. cites 9 Car. The Mayor of Bristol v. Whitton.

Duke's
Char. Uses,
82. pl. 35.
cites S. C.

11. Whether money given to maintain a preaching minister be a charitable use? The ld. keeper and the judges did decree (notwithstanding it is not warranted by the statute to be a charitable use) that the same shall be paid by the executor to such maintenance.

nance. Toth. 96. cites Trin. 15 Car. . Pember v. the Inhabitants of Kingston.

* 12. A. devises 20*l.* *per ann.* to a preaching minister, and dies, leaving lands and assets, and the defendant will not pay it accordingly. The court with the judges charges her, out of the assets, to buy lands to perpetuate it. Toth. 96. cites Trin. 15 Car. Pensterd v. Pavier.

Duke's
Char. Uses,
82. pl. 36.
cites S. C.

13. Devise of a charity to the poor indefinitely. In such case equity gives the disposal thereof to the king. Fin. Rep. 245. Hill. 28 Car. 2. The Attorney-General v. Peacock.

By the civil
law this de-
vise would
be to the
poor of the

hospital of that parish where the testator lived; and if no hospital there, then to the poor of that parish. Fin. Rep. 245. in S. C.

14. A gift to raise money to prosecute offenders will not be good as a charitable use; per curiam obiter. 2 Salk. 605. pl. 3. Pasch. 2 Ann. B. R. in case of the Queen v. Savin.

15. In Saffron-Walden in Essex was a free-school, and P. and others subscribed to a charity-school there of 12 boys and 12 girls, which subscription was only during the pleasure of the benefactors. P. being delighted with these charity-children, declared he would leave them something at his death. P. by will gave 500*l.* to the charity-school. The ld. chancellor said, that though the free-school be a charity-school, yet that for boys and girls went more commonly by that name; and as the testator was fond of the latter, and declared he would leave them a legacy, therefore that, and not the free-school, is intitled thereto; and because it was objected that on the failing of this charity-school the charity ought to revert to the founder, he gave liberty to the parties in such case to apply again to the court. Wms.'s Rep. 674. pl. 93. Mich. 1720. The Attorney-General v. Hudson.

16. One Timothy Wilson being seised of lands in fee, and also possessed of a considerable personal estate, by will dated 22d of March 1714, gave all his real and personal estate to two trustees, their heirs, &c. in trust, to pay the produce thereof to his niece Elizabeth Wilson for her life, and after her death he gave the said real and personal estate to the son and sons, which his niece should leave behind her, severally and successively according to seniority, and the heirs of the body of such son and sons issuing, the elder to be preferred, &c. and for want of such issue, that is, in case all such sons died without issue before any of them attained 21, then he gave the same to the daughter and daughters which his niece should leave behind her at her death, and the heirs of their respective bodies issuing; and for want of such issue, that is (as he expressed himself) in case all such daughters died without issue before any of them attained 21, then the said trustees and the survivor of them, and the heirs and executors, &c. of the survivor, were to dispose of his real and personal estate to such of his relations of his mother's side who were most deserving, and in such manner as they thought fit, and for such charitable uses and purposes as they should also think most proper and convenient. One of the trustees declining to act in the trust, Elizabeth brought her bill in Michaelmas 1715, to compel him to act in the

trust, or to transfer the same as the court should direct; and he refusing to act, the court decreed him to assign the trust as the master should direct, and accordingly he by lease and release assigned and conveyed the premises, with the approbation of the master, to another person in trust for the uses of the said will. *Elizabeth died without issue* in 1732, and on a bill brought by the testator's relations on the mother's side, to have their share of the said estate, and on a cross bill brought by the attorney-general to have the same applied to charitable uses as the court should direct, the *master of the rolls* held clearly that the limitation over of the personal estate was good, and that the power given by the will to the * trustees of distributing the testator's estate as they thought fit was at an end, and could not be assigned over, and that therefore the power of distributing the same devolved on the court; and she directed that one half of the said estate should go to the testator's relations on the mother's side, and the other half to charitable uses, the known rule that equity is equity being (as he said) the best measure to go by. He said, that he had no rule of judging of the merits of the testator's relations, and could not enter into spirits, and therefore could not prefer one to the other; but that all should come in without distinction, excluding only those that were beyond the 3d degree. He held, that as to the personal estate, there should be no representation of those relations who died in the life-time of *Eliz.* For before her death no part thereof vested in any of the relations, and it was contingent whether they would be intitled thereto or not, and decreed so accordingly. His honour cited a case determined by *Ld. Cowper*, which was where one gave his personal estate to his relations, *fearing God and walking humbly before him*, and decreed by him that it should go equally among his relations. *MS. Rep. Nov. 30, 1735. Doyley & al' v. Att. Gen. & al', & c contra.*

(D) Altered.

But it was observed to the court, that the practice had always been to apply them

1. **W**HEN a thing is disposed to maintain contempt and disobedience in any, this ought to be ordered and disposed by the court to a contrary use and end. *Lane, 44. Pasch. 7 Jac. Arg. cites Venable's case.*

in eodem genere. Vern. 251. in case of the Attorney-General v. Baxter.

2. The donor of a house to a vicarage for the vicar to live in, and a lease to be made by the trustees to the vicar for the time being, on condition of his having no other living, and of his being resident, being mistaken in his title, as thinking the vicarage was donative where it was presentative, made no presentation of a vicar, in default whereof the king presented by lapse. Decreed that the trustees lease this house to the king's presentee, but under the conditions abovementioned. *Nelf. Ch. Rep. 40. 15 Car. Joyce v. Osborne.*

3. A submission was to arbitrators touching lands, and they were awarded to B. and possession delivered accordingly, and no claim

claim was made during B.'s life. B. by his will devised these lands to a charity. J. S. purchased these lands, with notice of the award and devise; and it was decreed that the testator being *intitled in equity* to the land by the award, and the purchaser having notice, his purchase is not good, and the charity shall be established. Fin. Rep. 75. Hill. 25 Car. 2. Chard Parish, &c. v. Opie.

4. A devise was of a charity *to the poor*, without saying what poor; equity gives the disposal of this charity to the king, and in this case the king gave it to the governors of Bridewell, Christchurch, and St. Thomas's Hospital, for the 40 poor boys in Christ's Hospital, educated there to learn the art of navigation. Fin. R. 245. Hill. 28 Car. 2. Att. Gen. alias Christ's Hospital, v. Peacock.

5. *General charities* are under the direction and disposal of the king, and not of the commissioners, and to be settled by information in chancery for the king; but where the charities are devised to the poor for ever, the king cannot dispose to the poor kindred of the testator, because they cannot live poor for ever; so that such disposal by the king is to be to the poor who may take it for ever, by which the king directed it to Christ's Hospital. 2 Lev. 167. Trin. 28 Car. 2. B. R. Att. Gen. v. Matthews.

6. C. devised a *salary for maintenance of independent lectures in 3 market towns*, and devised the estate thus charged to his nephew, who afterwards devised it for payment of his debts. Bill was brought to have the lands sold for payment of the debts. Afterwards, upon an information for the charity, the growing payments and arrears were decreed, and the independent lectures *changed into catechistical lectures*, in the same 3 market towns, and this, though there were not sufficient to pay the debts. 2 Vern. 267. in pl. 252. cites it as decreed in 1679. Combes's case.

7. *No agreement of parishioners*, where several charities are given for several purposes, can alter or divert them to other uses, but they must be applied for the purposes for which they were given. Vern. 42. pl. 43. Pasch. 1682. Man v. Ballet.

Maintenance of a lecturer by agreement of the parishioners, the money so paid to the parson shall not be allowed on account. Vern. 42. pl. 43. Pasch. 1682. Man v. Ballet. — It must be accepted on the same terms as given upon, or leave it to the right heir. Fin. R. 222. St. John's Coll. Cambridge v. Platt.

8. A man having devised 50 l. per ann. for a lecturer in polemical or casuistical divinity, so as he was a bachelor or doctor in divinity, and 50 years of age, and would read 5 lectures every term, and at the end of every term would deliver fair copies of the same, to be kept in the university, and in default of such a lecturer, he gave that 50 l. per ann. to college in Oxon. Now, upon this information, the university of Cambridge, with the consent of the heir at law, would have had the rigour of the qualifications mitigated, viz. That a man of 40 years of age might be made capable of this salary, and that 3 lectures every term might serve turn, and that if he delivered such fair copies of his lectures once a year, it should be sufficient; but the ld. chancellor, though no

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2 Chan. Cases, 18. Hill. 31. & 32 Car. 2. The Att. Gen. v. Combe, S.C. decreed accordingly.

As if money given, or lands settled, for repairs of a church are bestowed in

one made opposition to it, refused to intermeddle in it, and said, they should be held to the letter of the charity, and that the heir had no power to alter the disposition made by his ancestor. Vern. 55, 56. pl. 52. Pasch. 1682. the Att. Gen. v. Marg. & Reg. Professors in Cambridge, &c.

9. Devise of 1000l. for such charity as testator had by writing appointed, and *no such note being to be found*, the king appointed the charity, and the same was decreed accordingly. Vern. 224. pl. 223. Hill. 1683. Att. Gen. v. Syderfin.

10. A. devised several particular charities, and the surplus *for the good of poor people for ever*. The surplus, being indefinitely devised, it was decreed, that the *king may apply the charity*. Vern. 225. cited Hill. 1683. in the case of Att. Gen. v. Syderfin, as the case of Frier v. Peacock.

So to 60 pi-
ous ejected
ministers,
decreed, per
Ld. Keeper
11. Money devised to *ejected ministers*; the king has the disposal of it. 2 Chan. Cases, 178. Mich. 2 Jac. 2. Att. Gen. v. Rider.

North, for the maintenance of a chaplain for Chelsea College. Vern. 248. pl. 243. Trin. 1684. Att. Gen. v. Baxter. — But this decree was discharged, and the information dismissed, and the money then remaining in court ordered to be paid out to Mr. Baxter, to be by him distributed according to the will; per Lds. Commissioners. 2 Vern. 105. Trin. 1689. Att. Gen. v. Hughes.

[488] 12. John Snell, by his will, charged his real and personal estate with an annual sum, or exhibition, *for the maintenance of Scotchmen in the university of Oxon. to be sent into Scotland, to propagate the doctrine and discipline of the church of England there*. Now, by the late act of parliament, presbyters are settled in Scotland; and it was insisted, that although the charity cannot now take place according to the letter and express direction of the will, yet it ought to be performed *cyprès*, and the substance of it may be pursued, that is, to propagate the doctrine and discipline of the church of England, though not in the form and method intended by the testator, and shall not be void, so as to fall into the estate, and go to the heir; no decree appears. 2 Vern. 266. pl. 252. Pasch. 1692. Att. Gen. v. Guise.

13. A charity given *to maintain popish priests* was *applied* by the king *to the other uses*, and not to turn to the benefit of the heir. 2 Vern. 266. pl. 252. Pasch. 1692. Arg. cites it as adjudged in the exchequer, and affirmed on appeal to the house of lords. Gates v. Jones.

14. An information was exhibited in the exchequer, *to discover whether an absolute devise of lands was not really in trust for superstitious uses, and if so, then to have an application thereof to an use truly charitable*; and it was held, first, that the king, as head of the commonwealth, is obliged by the common law, and for that purpose intrusted and empowered to see that nothing be done to the disherison of the crown, or the propagation of a false religion, and to that end intitled to pray a discovery of a trust to a superstitious use, and this use, being superstitious, is merely void, and for that reason the king cannot have it; yet, however, it is not so far void as that it shall result to the heir, and therefore

fore the king shall order it to be applied to a proper use.
1 Salk. 162, 163. pl. 1. 26 May, 1693. The King v. Portington.

(E) Favoured and Construed. How.

1. **A.** Devised lands to trustees in fee for maintenance of a preacher, and schoolmaster, and so many poor people, so much to each, and which amounted to the annual profits of the land at the time. *The land was then of the value of 35 l. a year, but afterwards came to be worth 100 l. a year.* Resolved, that the revenue should be employed to increase the stipends of each, and if there be any surplus, it shall be employed for a greater number of poor, and the devisees shall take nothing to their own use; for it appears that the whole shall be employed in works of piety and charity, and as a decrease of the value would be a loss to the preacher, schoolmaster, and poor, so when it increases it shall be to their profit; by all the judges. 8 Rep. 130. b. Pasch. 7 Jac. Thetford School's case.

S. C. cited a Vern. 398. Mich. 1700. in the case of the Att. Gen. v. the Mayor of Coventry, which case was, that the reversion in fee of divers lands let on leases, on which in all 70 l. per ann. was reserved, was granted by

king H. 8. to the corporation of Coventry; 400 l. of the purchase money was paid by the corporation, and 1000 l. by Sir Thomas White, but in the grant the corporation was said to be the purchasers, and it was by the deed declared that the whole 70 l. per ann. should be applied to several charities therein mentioned. The leases expiring, the value of the lands were greatly increased, but the surplus had been all along received by the corporation of Coventry, the lands themselves not being given to the charities, but particular rents out of the lands. It was decreed, that the corporation should have the surplus of the profits. The ld. keeper, and 3 judges, assistants, were all of opinion, that this case was not within the reason of Thetford School's case, but that there was a plain and substantial difference between them; for in that case the land were given to the charity, and though in directing the application of it a sum certain is given to maintain a schoolmaster, and sums uncertain to other charities, amounting to what was the value of the estate, it was reasonable, that as the estate increased, the charity should do so too, because no one else was to take any benefit thereof; but that in the present case *not the lands themselves but 70 l. a year issuing out of the lands is allotted to charities, and the town of Coventry is expressly mentioned to be the purchasers*, and it appears that they raised 400 l. part of the consideration money, and that with some difficulty by sale of their goods, gold rings, box-money, &c. and when they were in that low and decayed condition, as mentioned in the articles, the plaintiffs would have it presumed, that they were such good christians as to sell all they had to give it to the poor; and the information was unanimously dismissed; but upon an appeal to the house of lords the dismissal was reversed, and the defendants ordered to account for the improved value of the land, and the charities to be augmented in proportion.

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2. By devise of the rent of his land to a charitable use, the land itself passes, and it shall be taken largely for a devise of the rent then reserved, or afterwards to be reserved upon an improved value; resolved by the judges on a reference by the ld. keeper, and his lordship decreed accordingly. Duke's Char. Uses, 71. pl. 7. 9 Jac. Kennington Hasting's case.

Ibid. 112. f. 2. pl. 1. S. P. and refers to S. C. — In the county of Warwick, a rent devised [devised] to Linnington.

charitable uses, carries the land. Toth. 269. cites 8 Car. Lennet v.

3. A debt which is a *chose en action* was given for the erection of a school, and held a good appointment within the 43 Eliz. Toth. 91. 3 Car. Hungate ex Parte Inhabitants of Sherborne.

Duke's Char. Uses, 79. pl. 21. cites S. C. & S. P. de-

creed, whether the debt be owing by statute, bond, judgment, or recognisance. — Ibid. 112. cites S. C. and S. P. accordingly. † In the original it is (charitable uses in action).

4. If one devises money to a charitable use for relief of the poor, and makes 2 executors, and dies, and they prove the will, and jointly intermeddle with the receipt of the money, and the one trusts the other with the money, and to pay it accordingly, and he wastes it, and dies insolvent, the survivor shall be charged with the whole, if the testator left assets to pay it, because they jointly meddled in the execution of the will; but if he that died had only proved the will in the name of both, and the survivor had never meddled, he should not be charged; because the other had a joint authority with him from the testator, and he could not hinder the other's intermeddling. Duke's Char. Uses, 66, 67. pl. 4. 16 Mar. 4 Car. the Poor of Walthamstow in Essex's case.

Ibid. 64.
3. Trin. 9
Car. 1. East
Grinstead's
case, S. P.
and ibid.
70. pl. 8.
Hill. 14
Car.
Woodford
inhabitants

5. If a rent be granted out of land to a charitable use, this it seems is a charge that shall go with the land in whose hands soever it comes, albeit it be not so by the strict rules of law, and a distress may be taken for it upon the terre-tenant for all arrears in whose time soever it was; and the party must have his remedy against them that had the land for the arrears in their time in chancery. Duke's Char. Uses, 125.

6. In case of charitable uses, the charity is not to be set aside for want of every circumstance appointed by the donor. N. Ch. R. 40. 12 Car. 1. Joice v. Osborne.

Duke's
Char. Uses,
46, 47.
Pasch. 16
Car. 2.
Wright v.
the School of
Newport-
Pond in
Essex.

7. Devise of a portion of tythes, to the intent that the profits should be employed to build a grammar-school, and for the maintenance of the master; the tythes were then in lease for a term of years, at the yearly rent of 7 l. the devisees received the rent, and built the school, and in consideration of the surrender of the term, they granted a longer term to the first lessee, (viz.) for 50 years at the same rent; the lessee died about 24 years after the commencement of his lease, and his executors enjoyed it about 14 years afterwards, during all which time the yearly value was worth 43 l. per ann. more than the reserved rent; but before the lease of 50 years expired, the surviving devisee made a lease of those tythes for 21 years, at the yearly rent of 10 l. to commence after the expiration of the lease for 50 years; adjudged that this concurrent lease was void, being made to defraud the charity of the increase of the tythes, which was then worth 60 l. per ann. more than the reserved rent, and that the trustees ought to let it at that value, and not exceeding 21 years. Nelf. Abr. 434, 435. pl. 8. cites 16 Car. 2. Wright v. the school of Newport.

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A charity
was devised
to the poor of
the parish of
L. in the
county of
M. whereas
there is no
such parish
in that coun-
ty, but in the
county of D.

8. M. C. bequeathed 100 l. to the church-wardens and overseers of the poor of the parish of St. Giles's without Cripplegate, London, part whereof lies in London, and part in Middlesex, to be paid to them to encrease the parish stock, which was paid to them accordingly, and they placed the same out at interest, and received 3 l. interest, and paid it to the poor of that part of the said parish which lies within London, but no part thereof to the poor of the other part of the parish which lies in Middlesex. It was decreed by the commissioners, that the payment should have been to both parts of the parish,

as well that in Middlesex, as in London; but, upon exceptions taken, that decree was reversed. Duke's Char. Uses, 52. 19 Car. 2. in Canc. Rooks v. D.

Per cur.
there being
such a parish
in the county
of D. the

testator must mean that parish, because it appeared that *he was born there*, and that both he and his parents lived and died in that parish. Fin. Rep. 395. Mich. 30 Car. 2. Owens v. Bean.

9. Where a will or money given to a charity have been concealed, the same has been decreed to support a charity; as for instance, the will of James Meek was *concealed, by which he gave 100 l. per ann.* in East-Smithfield, St. Katherine's and Aldgate, *to learn poor scholars, to be chosen out of the free-school in Worcester, to be educated in Magdalen-hall in Oxford*; it was proved he made such a will, and that a little before his death he declared that he would not alter it; and the heir at law refusing to convey these houses out of which the rent issued, according to the will of the testator; the commissioners decreed, that the chancellor, master and scholars of the university should stand seised, &c. and pay the rents as directed by the will, which decree was affirmed in chancery. Nelf. Abr. 436. pl. 10. cites Moor Ch. Uses, 79. Meek v. Magdalen-hall.

Duke's
Char. Uses,
47. Trin.
21 Car. 2.
S. C.

10. Tertenants lessees of a charity which was *greatly improved*, as from 20 to 150 l. per ann. were ordered to *augment the rent 50 l.* per ann. but the commissioners had before made a decree for avoiding the leases, they being not good in strictness of law. Chan. Cases, 195. Hill. 22 & 23 Car. 2. Smith v. Stowell.

11. One Coleman devised an annuity of 20 l. a year to any of the name of Coleman, who should be fit to be a student and reside in Bennet-College in Cambridge, with a power to the master and fellows to disstrain for this annuity. On a bill brought for this annuity by the plaintiff Coleman, a student of the said college, it was decreed accordingly. Fin. Rep. 30. Mich. 25 Car. 2. Coleman v. Coleman and the Master, &c. of Bennet College.

12. Lands were charged with payment of a charity of 1000 l. and the money was paid to the executor of the executor of the testatrix, after which the lands were sold; decreed that the payment was made to a wrong hand; for that by 7 Jac. 1. 3. it should have been paid to the parson of the parish or vicar, &c. that the lands are still chargeable with it. Fin. R. 187. Mich. 26 Car. 2. Attorney-General for the King and Rector of Chiddleston cum Farley in Hampshire, and the Churchwardens and Overseers of the Poor of that Parish, v. Lord Newport & Worley.

13. Lands were given to the poor of the city of Rochester; it was decreed that the poor of the liberties and precincts of the said city shall have a share of the charity. Fin. Rep. 193. Hill. 27 Car. 2. Attorney-General v. the Mayor of Rochester.

14. A. lived in Lambeth, and built an alms house there, wherein he placed 7 poor women of Lambeth of 60 years old and more, and charged Caroon House there with payment of 4 l. a year to each, and directed that the places of such as died, should be supplied by others, but did not mention whether of Lambeth, or any other parish. The court decreed the poor women to be chosen out of Lambeth only,

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and not out of any other parish; because otherwise the charity would rather be a prejudice than a kindness to Lambeth; for if taken out of other parishes, Lambeth must maintain them, the 4l. a year not being sufficient to maintain a poor woman of 60 years old. Fin. Rep. 353. Pasch. 30 Car. 2. Attorney-General v. Whitchcott, alias Bodwyn & al', v. Whitchcott.

15. Lands *pur autre vie* devised to charity were decreed, though the charity is not within the statute of 43 Eliz. 4. 2 Chan. Cases, 18. Hill. 31 & 32 Car. 2. Attorney-General v. Combe.

16. The poor people of an hospital were appointed to have 8d. a day, and the guardian 8l. per ann. A prebend residentiary for the time being was to be the guardian. The revenue was improved to 60l. per ann. All above 8l. per ann. was decreed to the poor. Some of the counsel made a difference between this case and where the only employment was to be a guardian. 2 Chan. Cases, 55. Trin. 33 Car. 2. Anon.

17. Charitable legacies by the civil law are to be preferred to other legacies; and if the spiritual court gives such preference in case of deficiency of assets, chancery will not grant an injunction. Vern. 230. pl. 226. Hill. 1683. Fielding v. Bond.

18. A house burnt down in the fire of London was charged with 25 s. a year ancient rent to a charitable use, of which there was an arrear for 20 years. The court of judicature for rebuilding, settled the rent of the tenant at 5 l. a year. The question was who should pay the 25 s. rent and arrears, the tenant or the landlord. *Ld. Keeper ordered the growing payments and arrears of the 25 s. to be deducted out of the rent, and the tenant to pay no more rent in the mean time.* Vern. 309. pl. 304. Hill. 1684. Grice v. Banks.

19. Charity though given to an illegal or superstitious use, shall not be void for the benefit of the executor or heir, but ought to be performed *cy-pres*; Arg. 2 Vern. 266. pl. 252. Pasch. 1692. Attorney-General v. Guife.

20. A. by will bequeathed to his heir at law (his nephew) 40s. Then adds, *being determined to settle for the future, after the death of me and my wife, the manor of S. with all the lands, woods, and appurtenances to charitable uses, I devise my manor of S. with the appurtenances, to F. G. and H. and their heirs and assigns on trust, &c. to pay and deliver yearly, for every several particular sums therein mentioned. The particulars in the will of the sums to be paid in charity amounted but to half the rent of the manor, as it was at the time of making the will; yet it was decreed that the surplus should be disposed in charity, and not go to the heir; and the decree was affirmed in dom. proc.* Parliament Cases, 22. Arnold v. Johnson & al'.

21. On the foundation of an hospital one rule is, that no lease be made for above 21 years. A lease for 21, with a covenant to make it 60 years by renewal, is as prejudicial as a lease for 60 years, and the covenant of no force in equity. 2 Vern. 410. pl. 376. Hill. 1700. Lydiatt & al' on behalf of Felstead Hospital in Essex v. Sir John Foach.

22. A cor-

22. A corporation for a charity are but trustees for the charity, and may *improve*, but not do any thing in prejudice of the charity, or in breach of the founder's rules; per Wright keeper. 2 Vern. 412. pl. 376. Hill. 1700. *Lydiatt & al' v. Sir J. Foach.* Note, that in this case the founder's rule was further, that on such lease for 21 years *should be reserved the old rent, and no more*; and yet by deed of covenants they reserved an additional rent almost double the old rent, as 32 l. per ann. for 18 l. per ann. and yet it was decreed to be paid, though this is contrary to the express rule.

2 Vern. 596. pl. 535. Mich. 1707. *Watson v. Hinfworth Hospital*, which had the same rule; and *Ld. Elefmer and Ld. Clarendon* kept them down to the rule; but per Cowper C. the rule is alterable as prices of things alter, and the rent may be increased, but the tenant is intitled to a beneficial lease, and referred it to the archbishop of York, to certify what fine and rent he thought reasonable.

23. *Charity-lands were leased at a great under-value.* The commissioners decreed the lease to be set aside, and the lessee to pay the arrears of rent according to the full value, (the odds being from 24 l. per ann. to 133 l. per ann.) and to deliver up the possession. The court, on exceptions, confirmed the decree as to the making the lease void, and delivering possession, and to set out the charity-lands from the lessee's other lands which lay intermixed. 2 Vern. 414. pl. 378. Hill. 1700. *Sir W. Reresby, Exceptant, Farrer and Dun, Schoolmaster and Usher of Pocklington-School, Respondents.*

24. Charities are *not barred by length of time*, or any *statute of limitations*; per *Ld. Wright* and 3 judges. 2 Vern. 399. pl. 369. Mich. 1700. *In case of the Attorney-General v. the Mayor, &c. of Coventry.*

25. *Lord Coventry* having decreed a lease of charity-lands to *J. S.* (who had been at great expence in recovering those lands) for 99 years, if 3 lives lived so long, *at the rent of one third of the then improved value, and to be perpetually renewable without fine.* It was now decreed that the lease should be renewed toties quoties without fine, but the rent not to be computed according to the value of the land when the decree was made, but at the *improved value* at the time it shall be renewed; per *Cowper C.* 2 Vern. 746. pl. 653. Hill. 1716. *The Attorney-General, at the relation of Wotton-under-edge, v. Smith.*

26. Appointment by *tenant in tail* shall bind the reversioner in fee, the statute of charitable uses supplying all defects of assurance which the donor was capable of making. 2 Vern. 755. pl. 660. Mich. 1717. *The Attorney-General v. Burdett, Smith, & al'.*

27. One by will gives 5 l. per ann. to all and every the hospitals; and it was proved the testatrix lived in a place where there were 2 hospitals. It shall be taken to be these hospitals, and not to extend to another hospital about a mile from thence, though founded by the same person. *Wms.'s Rep.* 425. pl. 118. Pasch. 1718. *Masters v. Masters.*

28. The *reversion in fee of diverse lands, on which 70 l. per ann. rent was reserved*, was given to the corporation of Coventry, and the whole 70 l. appointed to particular charities. Afterwards the lease expired, and the rents were greatly increased. The overplus shall be applied to the augmentation of the charities, and not for the benefit of the corporation. MS. Tab. March 8, 1720. *The Mayor of Coventry v. the Attorney-General.*

29. In-

29. Information to establish a charity of lands given by will, against the heir at law of the deviser. The defendant by his answer did not insist upon his title, nor did he expressly disclaim; but his counsel, at the hearing, had no instructions to insist on the defendant's title, or to pray a trial at law, and thereupon the court decreed the lands to the charity. Upon a petition of re-hearing, the defendant by his counsel insisted upon his title as heir at law, and that the devise was void; but the court would not now, at the re-hearing, allow the defendant to insist upon his title, since he had waived it before by his counsel at the hearing, but said, he was concluded by it; and though it was admitted to be a doubtful case, the court would not suffer counsel to argue it, but affirmed the decree; per Ld. Macclesfield. MS. Rep. Mich. 9 Geo. in conc. The Attorney-General v. Arden.

[493] (F) Trustees, &c. Favoured; or punished for Misbehaviour, &c. In what Cases.

1. *Executors* having goods of their testator to dispose to pious uses, cannot forfeit them; for they have them not for their own use; but their power is subject to the controulment of the ordinary, and the ordinary may make distribution of them to pious uses. And it was said at bar, that the ordinary might make the executors to account before him, and to punish them according to the law of the church if they spoil the goods; but cannot compel them to employ them to pious uses. Owen, 33, 34. Hill. 40 Eliz. per Cordell, Master of the Rolls, in the case of Stinkley v. Chamberlain.

Duke's
Char. Uses,
116. cites
S. C. &
S. P. and

says, that the converting it to other uses than according to the intent of the donor, is a misemployment; as if it was to find a preacher, and the trustees employ it to the poor, or some other kind of use.

2. If land is given to find a priest in D. and one is maintained in S. this is a misemployment; per Altham, baron. Lane, 115. Pasch. 9 Jac.

S. P. and
the commis-
sioners may
decree the
money with
damages

for the detaining it, to be employed in the charitable use according to their discretion, not exceeding legal interest by the year, for the detaining it. Duke's Char. Uses, 67. pl. 3. Trin. 9 Car. 1. in Walthamstow in Essex's case.

3. Monies given for relief of the poor were laid out on building a conduit; and adjudged a misemployment. Duke of Charitable Uses, 94. 5 Car. 1. Wivelscomb in com. Somerset.

4. Keeping the profits of lands, or money given to a charitable use in their hands, whether it be concealed or not, and not to pay it when it is due, or to convert it to other uses, is a misemployment within the statute. Duke's Char. Uses, 116.

The com-
missioners
may make
void the
lease, and

order the surrender thereof, and order the land to be settled on other trustees. Ibid. 123. l. 20. Ibid. 67. pl. 5. Mich. 10 Car. S. P. as to the avoiding and surrendering the lease. Relolved. Eltham's Inhabitants v. Warner. Ibid. 124. S. P.

5. Leasing the land at an under-value is a misemployment, without having regard to what the right was before. Duke's Char. Uses, 116.

6. It shall be accounted and called a mis-employment of a gift or disposition to charitable uses, in all cases where there is found *any breach of trust, falsity, non-employment, concealment, mis-government, or conversion in and about the lands, rents, goods, money, &c.* given to the use, against the intent and meaning of the giver or founder. Duke's Char. Uses, 115.

7. If lessee of land given to such a use, *does waste* and destruction upon the land, by cutting down and sale of trees of timber, especially if it be where he has the land at an under-value, or the like, this is a mis-employment; in this case the commissioners may decree the lease to be void and surrendered, and that the lessee shall make a recompence. Duke's Char. Uses, 115.

8. If trustees *lease the land at an under-value*, the commissioners may order the trustees, or the tenant, as they shall see cause, to make it up. Duke's Char. Uses, 116.

9. Trustees of a charity *refused to undertake the trust*. The court ordered other trustees to perform the same, with proper powers; per Ld. K. Littleton. N. Ch. R. 42. 17 Car. 1. *Maggeridge v. Gray*.

10. The inhabitants of *Cosfield* were incorporated by H. 8. and the manor and park granted to them *in fee*, by the name of the warden and assistants, and the grant was made to them; and it appeared by the grant, that the same was *for the benefit of the inhabitants for ease of taxes, and relief of the poor*. A suit was in the star-chamber touching mis-employment and enclosing the lands, whereby the inhabitants were prejudiced, and there decreed, that no farther inclosure should be made without consent of the major part of the inhabitants. In king Charles the first's time, some of the principal of the inhabitants, Mr. *Pudsey*, and others, took a new charter, leaving out the inhabitants, and now the warden and 23 more made leases and inclosures, without consent of the major part; and the plaintiff, an inhabitant, on behalf of himself and the rest of the inhabitants, brought his bill; and the ld. keeper decreed against the new leases and inclosures, and that no such should be without consent of the major part; and on re-hearing confirmed this decree; for *though the administration was in the 24, yet the benefit was for the inhabitants in general*; but it was pressed much that the 24 were the corporation, and the interest in them, and they might alien the estate, and a fortiori lease and inclose, and it would breed a confusion if that the multitude must intermeddle. Chan. Cases, 269, 270. Mich. 27 Car. 2. Anon. [494]

11. Feoffees of a charity having *mis-employed the rents, &c.* were decreed to account, and the trust to be transferred to such persons as the judge of assize shall nominate, and that the account of the rents and profits be for 6 years past, and that all the deeds and writings shall be delivered to such persons whom the judge of assize shall appoint to be feoffees, and the executors of such of them who are dead shall come into the account, and the arrears shall be paid to the new trustees, and conveyances executed to them

Money given for the repair of a bridge and a church way, and certain houses, were employed to repair the church; the trustees were

decreed to account for what they had, or might have received without their wilful default, without respect to other disbursements than the bridge, the way, and the houses; and the trustees, the defendants, to pay costs. *Fin. R. 259. Trin. 28 Car. 2. Att. Gen. and Churchwardens of Somersham, in Huntingdonshire, v. Hobert and Johnson, alias Hammond v. Hobart.*

them accordingly. *Fin. Rep. 269. Mich. 28 Car. 2. Love v. Eade.*

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12. *Trustees* for charitable uses are no otherwise or further chargeable than any other trustee is, who is only to be charged for so much as he receives, and shall not stand charged for the receipts of others; per Finch C. *Vern. 44. pl. 42. Pasch. 1682. Mann v. Ballet.*

13. By the appointment of a charity there were 6 trustees, and when they should be reduced to 3, they should *chuse others*. All the 6 were dead except one. Cowper C. held, that *filling up the number by the only surviving trustee* was good, for it was only directory, and the neglect did not extinguish the right, and he only did what he ought to do. 2 *Vern. 748. pl. 655. Hill. 1716. Att. Gen. at the relation of Tracy & al', v. Floyer, and relating to Waltham Holy Cross.*

MS. Rep.
Pasch.
6 Geo.
Phillips v.
Sir John
Walters.

14. Bill to have an account of the profits and salary of lecturer of Church-hill in com. Oxon, upon this case; Sir John Walters, Ch. B. founded a *lectureship* at Church-hill, Oxon. *with a salary of 50 l. per ann.* charged upon his lands to the lecturer, so long as he should attend the charge of diligent preaching there once every Sunday, unless hindered by necessity, and when the said *lectureship should be void by death, removal, departure, or otherwise*, then the trustees were to appoint a new lecturer, &c. The plaintiff, in 1701, was appointed lecturer by the trustees expressly for the term of his natural life, but being much in debt about a year and a half after the appointment, the plaintiff went away, and was chaplain to a regiment in Spain, and continued many years abroad in that employment. In 1710 the trustees appoint Griffin lecturer, and in the deed of appointment they recite, that the lectureship was vacant by the departure of the plaintiff Phillips, and thereupon they appoint Griffin lecturer. First point was, if the trustees could remove the plaintiff Phillips from the lectureship for going abroad, and not personally preaching there every Sunday, and appoint a new lecturer in his room? Second point, admitting they had a power to remove him for absence, if Sir John Walters in this case ought to account to the plaintiff for the profits of lecturer to the time that the new lecturer was appointed? Counsel for the plaintiff argued, that the appointment of the new lecturer by the trustees was void, the plaintiff Phillips being expressly appointed lecturer for life he had a freehold, and that the trustees could not turn him out of his freehold, without some *legal process or sentence in the spiritual court*, or at least they ought to have *summoned him to appear before themselves*, and to hear what excuse he could make for his absence, before they had removed him, and compared it to the case of a removal of an officer in a corporation for non-attendance or non-residence in the corporation, &c. and there ought to be a summons before a removal, &c. As to the 2d point, they said, it was a clear case that Sir John Walters

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Walters was accountable to the plaintiff for the profits of the lectureship till the new lecturer was appointed, deducting what Sir J. Walters paid for supplying a sermon every Sunday in his absence, which appears by the answer not to amount to half the value of the salary, otherwise Sir John would save the money in his own pocket, there being no person that can any ways claim it but the plaintiff. Counsel for the defendant insisted, that the plaintiff was not intitled to any account at all against the defendant, for that it was proved in the cause, that the plaintiff did not read the common prayer the first time he preached, according to the act of uniformity 13 & 14 Car. 2. cap. 4. s. 19. and thereby the lectureship was void. As to the other point, they insisted, that the plaintiff had forfeited the lectureship by going abroad, and not preaching personally at the church by the express words of the founder, and the same was *ipso facto vacant*; and therefore the trustees might appoint a new lecturer, and such appointment was good. Parker C. was of opinion, that Sir John Walters employing another person to preach in the absence of the plaintiff, acted therein as the plaintiff's agent, and not as a trustee of the charity, and consequently ought to account to the plaintiff for the profits of the lectureship, deducting what was paid by him for supplying the plaintiff's place in his absence, but whether the appointment of the new lecturer was good or not, yet Sir John Walters having paid the whole salary to Griffin, will discharge him against the plaintiff as his agent in procuring a proper person to preach, and to do the duty for the plaintiff, but he doubted if the appointment of the new lecturer by the trustees was good, and took time to consider of that point. Afterwards, 27 May, he delivered his opinion, that the appointment of the new lecturer was good; and he said the lectureship was not void by the 13 & 14 Car. 2. cap. 4. for not reading the common prayer, for that act inflicts a penalty, but does not make the lectureship void, but the lectureship was void by the plaintiff's absence, and the necessity of absentsing himself by reason of his debts was not the necessity intended by the founder to be an excuse for his absence; and though he was declared lecturer expressly for life, yet he is subject to the terms imposed by the founder; for the trustees cannot alter the terms and nature of the trust, and the first appointment is superseded by the 2d without any other act.

15. A college seized in fee, was restrained by its constitution from making other leases than for 21 years and at the rack-rent. They made a lease accordingly to J. S. who having much improved the premises by building, an entry was made thereof in the audit-book, and a recommendation signed by the master, warden, and most of the fellows, to grant him a new lease at the end of the term at the same rent, and when the lease was near expiring, an order was made at the audit for such new lease. But Ld. C. Parker disapproved of the recommendation, it being to wrong the college and break the statutes; and that the signing of a contract for leasing by the master and fellows, was not binding to the college, it not being under the college seal. But in case the tenant after this order had laid out money in improvements in confidence

dence and reliance on such order, there would have been some equity in it. But even in that case he should only have his reparation from the private persons signing such order, and not from the college; and as to repairs done by the lessee since the order for the new lease, they are no more than what by his old lease he was obliged to do; and therefore dismissed the tenant's bill for compelling a new lease, and with costs. Wms.'s Rep. 655. Mich. 1720. Taylor v. Dullidge Hospital in Surry.

16. In case of misbehaviour of trustees, or misapplication of charity, chancery will *oblige them to assign*. MS. Tab. March 8, 1720. Mayor of Coventry v. Attorney-General.

17. The governors of a free-school joined in a long lease of houses at 5 l. a year, though worth 50 l. a year. The lords commissioners decreed the assignee of this lease to surrender it back, and ordered the lessee and the governors to pay 70 l. costs. And Ld. C. King affirmed the decree as to the surrendering, but reduced the costs to 50 l. and thought there was no reason that the charity should pay the costs, but that the lessee who was to have the benefit should; and that the governors, though not guilty of corruption, nor were to gain any thing, yet ought to pay some costs for their extreme negligence. 2 Wms.'s Rep. 284. Trin. 1725. East v. Ryall.

(G) Commissioners. Their Power. And Decrees made by them confirmed, or set aside.

Duke's
Char. Uses,
79. pl. 22.
cites S. C.
and says that
the decree
was affirmed by the ld. keeper upon an appeal to him.

1. **W**HEN a donor appoints lands or goods to be sold, for to maintain a charitable use, and doth not appoint by whom the sale shall be made; it shall be made by such as the commissioners shall appoint. Toth. 92. cites 41 Eliz. Steward v. Jermin.

Mo. 890.
pl. 1253.
14 Jac. Ri-
vet's case.

2. A commission of charitable uses was sued out by fraud to avoid a charitable use, and the commissioners made a decree for exemption from the charity, and that decree confirmed by the chancellor. Yet a new commission was sued out on the statute of charitable uses, and the lands charged with the charity, though the words of 43 Eliz. 4. are, the said commissioners to make order, &c. Arg.

* [497]
Jo. 147. pl.
5. S. C. re-
solved upon
reference to
Crew Ch. J.
Walter Ch.
B. and Jones
and Crooke
J. that no

Show. 206. cites Mo. pl. 1153.

3. A decree in chancery upon the 43 Eliz. 4. is conclusive, and not to be further examined, because it takes its authority by the act of parliament, and the act mentions but one examination, and it is not like to where the chancellor makes a decree by his ordinary authority. Cro. C. 40. pl. 2. Mich. 2 Car. Windfor v. Inhabitants of Farnham.

bill of review lies, because the statute is introductory of a new law, and gives *an appeal on a decree made by commissioners to the ld. keeper, and when he has affirmed it, his affirmation is peremptory, and no review thereof can be made by himself or his successor.——S. C. cited Cro. C. 351. Hill. 9 Car. B. R. per curiam.——But in such case the party grieved may petition the king in parliament, and have his complaint examined, and so the decree may be affirmed, altered, or annulled. Duke's Char. Uses, 62. Eastham

Eastham in Essex's case. — When the Id. keeper has altered or confirmed a decree made upon the Statute 43 Eliz. 4. the decree is to be perpetual, and then to remain in the petty bag. Toth. 91. cites 8 Car. Poor of East-Greensted v. Howard.

4. If money be given to a charitable use by will, and the executors detain it in their hands many years without employing it according to the will, having assets, the commissioners may *decree the money with damages for detaining of it*, to be employed in the charitable use, according to their discretion, not exceeding 8 l. per cent. for a year for the damages. Duke's Char. Uses, 67. pl. 4. 16 Mar. 4 Car. Walthamstow in Essex's case.

5. My lord keeper declared, that when he had altered or confirmed the decree made upon the statute of 43 Eliz. *the decree is to be perpetual*, and then to remain in the petty bag; and it is in his power to make a decree good which is defective. Toth. 91. cites 8 Car. The Poor of East-Greensted v. Howard.

Duke's Char. Uses, 79. pl. 20. S. C. says, the decree is * not perpetuated, and not to be al-

tered but by act of parliament. printers.]

* [The first (not) seems to be put in by mistake of the

6. If a *rent-charge* be granted to a charitable use out of lands in several counties, the commissioners are to charge this rent by their decree upon all the lands in every county, according to an *equal distribution, having regard to the yearly value of all the lands chargeable* with the rent, and cannot by their decree charge one or two manors with all the rent, and discharge the residue in other counties or places; for that their decree will then be contrary to the will of the founders or donors. Resolved by the Ld. K. Coventry. Duke's Char. Uses, 65. pl. 3. Trin. 9 Car. East-Greensted's case.

7. If a *rent* be granted out of lands in several counties for maintenance of charitable uses in one county, the commissioners in that county where the charitable use is to be performed, may make a decree to charge the lands in other counties to pay an equal contribution of charge in payment of the said rent; and there *needs not several inquisitions in each county*, for that the rent is an intire grant by the deed or will. Resolved by Ld. Coventry. Duke's Char. Uses, 64. pl. 3. Trin. 9 Car. East-Greensted's case.

8. A charitable exhibition was devised *disposable* by 4 parsons of such parishes for the time being. They *disagree* in their election; 2 choose A. and 2 choose B. Thereupon a *commission issues*. The commissioners direct another meeting of the 4, and *award, that if the 4 disagree, the bishop of W. should choose one*, and in case of a vacancy, the guardian of the spiritualties; and decreed 10 l. of the arrears that should incur between the vacancy and the election, to go towards the charges of suing out the commission. The 4 *disagreed*, and the bishop of W. elected one. *Exceptions* were taken to the decree, but over-ruled, and the decree confirmed. Fin. Rep. 78. Hill. 25 Car. 2. Steers v. Burt & Holland.

9. *Decree of commissioners* against a purchaser of lands charged with a charity, but without notice of the charity, for payment of *costs*, and *arrears of the annuity* due before he had the actual possession of the said close, was, as to so much thereof, reversed. Fin. Rep. 81. Hill. 25 Car. 2. Wharton v. Charles & al' in behalf

half of the poor of Warcup and Blebarn in com. Westmoreland.

10. A *new commission to prove the yearly value* of lands charged with a charity, though the former commission was executed and returned, was * granted on a pretence of surprize, and that the *exceptant* had other witnesses to examine; but if the respondent examine no witnesses, but only cross-examine those produced by the exceptant, then the exceptant to be at the charge of the commissioners on both sides, otherwise each to bear the charge of his own commissioners. Fin. Rep. 251. Trin. 28 Car. 2. Harding v. Edy.

11. *Decree made by commissioners was reversed*, and the exceptants quieted, on payment of such rent as had been paid for a long time before. Fin. Rep. 293. Pasch. 29 Car. 2. Leas and Goldsmith v. the Feoffees of Brerewood-School in Staffordshire.

Chan. Prec. 111. pl. 98. S. C. that a decree was made by the commissioners of charitable uses, and exceptions were taken to it,

12. The commissioners cannot decree *costs* on the stat. 43 Eliz. but if there be an appeal from their decree, the ld. chancellor may decree the costs not only of the appeal, but of the commission also, and though they decree costs that shall not upon an *appeal* be sufficient to *reverse* the decree; for the ld. chancellor may either surcease or lessen the costs, or exempt the party from them intirely. Abr. Equ. Cases, 126. Pasch. 1700. Rockley v. Keyly.

and they now came on before the master, and he and most of the bar were of opinion, that by the statute of Eliz. the master of the rolls may hear an appeal as the chancellor may, and may affirm the decree, and give costs, notwithstanding the statute mentions only the chancellor; but Mr. Edwards the register said, it had always been an exception, and therefore the master of the rolls would do nothing in it.

13. *Issue at law* was directed on a rehearing of exceptions taken to a decree made by commissioners of charitable uses, after that decree was *twice confirmed*. 2 Vern. 507. pl. 456. Trin. 1705. Corpus Christi College v. Naunton parish in Gloucestershire.

14. Where *commissioners*, for charitable uses, *intend to oppress*, the court will punish them. 9 Mod. 65. Mich. 10 Geo. Wright v. Hobert.

(H) Proceedings. And Exceptions to Decrees.

It was doubted that the court could not relieve upon a bill, but

1. **C**Hancery may *relieve upon an original bill* within the statute of charitable uses. Chan. Cases, 135. says a decree was produced where, upon the advice of 4 judges, it was so resolved 30 June 1657, in case of St. John's College v. Platt.

that the course prescribed by the statute, by a commission of charitable uses, must be observed in cases relieviable by that statute; but no positive opinion was delivered, the defendant consenting to a decree. Chan. Cases, 158. Hill. 21 & 22 Car. 2. The Attorney-General v. Newman, alias Trinity-College v. Newman — But *ibid.* 267. Mich. 27 Car. 2. Relief was given by an original bill. — Chan. Cases, 267. Mich. 27 Car. 2. Prat v. St. John's College, it was objected that the process and method appointed by statute ought to be held, viz. a commission and inquisition, and decree by commissioners, and so to come at last to a final decree by the ld. chancellor or ld. keeper, and not to sue by original bill, as was done in the principal case; but the ld. keeper decreed the charity, though before the statute no such decree could have been made.

2. A de-

2. A decree made on behalf of a town about charitable uses. The town may *lay the whole money upon any one* they shall find liable to the payment thereof, which when done a *commission* shall issue to examine in whose possession any of the lands liable to the money decreed are, and the commissioners to *apportion* each party's payment with such proportionable part of *the charges* as the defendant hath been put unto. Chan. Rep. 91. 11 Car. 1. The Town of Market-rising v. Brownlow.

3. The report of myself and all other the judges made to my [499]
 Ld. Keeper, upon a reference to us of exceptions taken in the chancery to a decree made by the commissioners of charitable uses in Mich. term 1668, as follows. According to an order made in the high court of chancery on Tuesday the 11th of June last past, in a cause here depending between Ralph Tattle, John Lee, Grace Harding, Tho. Rock, and Nath. Humphreys, exceptants, and John Bradshaw, rector of the parish-church of St. Michael, Crooked-lane, London, and others, respondents. We have called all parties, viz. their counsel, before us, and upon consideration of the decree mentioned in the said order, and hearing what was alleged on the other side, we find that by *inquisition* taken before some of the commissioners for charitable uses, *in the absence of the exceptants*, it was found that *several houses and lands therein mentioned were given by several persons, some in the time of E. 3. some in the time of Queen Eliz. and since, to several uses within the said parish, viz. some to the poor, some to the repair of the church, and some for preaching sermons; and that since the year 1646, the rents and profits had been received by 13 several persons, and not employed to the aforesaid uses; and the commissioners thereupon caused a charge to be drawn up of those rents and profits, amounting to 3847l. 10s. and because the exceptants did not discharge themselves of that sum, they have decreed the exceptants and every of them, being 5 of the aforesaid 13 persons, to pay the said 3847l. 10s. and to alter the feoffees; which decree we do conceive to be all together erroneous, and ought to be reversed; 1st, Because the exceptants were by order of some of the commissioners debarred from being heard before the jury, until after the inquisition was found. 2dly, For that it does not appear to us but that as much, or more, has been yearly paid to and for several charitable uses directed by the donors, as is required by their respective wills and gifts, though the same has not been mentioned to be paid out of the rents of the respective houses and lands by them given. 3dly, Because we find that all the parish-rents and moneys, within the time mentioned in the said decree, have been by the exceptants, and the preceding and succeeding churchwardens, paid and accounted for, and those accounts audited and allowed according to the ancient usage of that parish; and we conceive that the way used by the exceptants, and other churchwardens of that parish, touching leasing out the premises, receiving the rents, and accounting for the same, is fit to be continued. And for an expedient to prevent the frustrations of commissions upon the statute for*

Vol. IV. Qq charitable

From a copy
 of a MS.
 Rep. of Ld.
 Ch. J.
 Keeling,
 Mich. 1668.
 Tattle v.
 Bradshaw.

charitable uses by the wilfulness of any person, we conceive that it is requisite that the persons who are complained of for diverting the charity, be heard before the jury, and have liberty to answer for themselves before the inquisition be found, and thereby they will have less (if any cause at all) to put in exceptions to decrees made against them; all which we humbly certify, and refer to your lordship.

4. Sir Tho. Smith devised his lands in fee to such charitable uses as the Lord Lumley and Sir Henry Henn should appoint, &c. They appointed 5 l. to the poor of St. Mary in Cheshire, and the commissioners decreed that the churchwardens and overseers of that parish might distrain for this 5 l. The questions were, whether the commissioners could add a power of distress where there was none by the original gift; and whether the commissioners in Cheshire can bind the lands in Essex with such an additional clause; and adjudged in both points that they might. Raym. 209. Hill. 22 & 23 Car. 2. B. R. Harrison v. Grovener.

But the reporter says, quære?

What need of such a bill?

For when a decree is made by commissioners, the court is to return it into the petty-bag, and then to serve the defendant with a writ of execution, upon which service the defendant may file ^a exceptions, and pray to stay proceedings till they are heard, but if the defendants do not then except, but submit to the decree, it seems reasonable they should be concluded thereby, and not be admitted to exceptions after. Ibid. 193, 194.

^a [500]

6. A decree being made by the commissioners of charitable uses, exception was taken thereto, viz. that in the several purchases made of the premises from the time of queen Elizabeth, to the time the several lands of the 2 exceptants have been quietly enjoyed, without any thing demanded for the use of the said school, save only 20 s. rent reserved out of the lands of one of them, payable yearly to John Gifford and his heirs; and 30 s. rent payable yearly out of the lands of the other to the said Gifford and his heirs, who granted the said lands to the ancestors of the exceptants anno 10 Jac. and which hath been paid, from time to time, for the use of the said school, and never at any time demanded or paid to the said Gifford, or his heirs; which the exceptants do believe might proceed from such agreement made between the Giffords, and the feoffees of the said school. Thereupon the court declared there was no cause to charge the exceptant's lands with the decree made by the said commissioners, or with any exactions or impositions of rent, or sums of money whatsoever, and reversed the decree of the commissioners for charitable uses; and decreed that the lands of the exceptants shall be from henceforth discharged of the same, and of all sums whatsoever by the feoffees, other than the 20s. and the 30s. aforesaid. Fin. R. 293, 294. Pasch. 29 Car. 2. Leas v. Morton.

S. C. cited
Arg. Mich.
13 Geo. 2.

7. A decree by commissioners for charitable uses was excepted to in chancery, which after confirmed the other decree, but in the
insertion

interim A. the person decreed against, conveyed his lands to raise portions for his daughters, with power of revocation; this shall not hinder execution for the money decreed, but the *lands aliened shall be sequestered* for the money, and a scire facias against A.'s heir, A. dying after the decree confirmed. 2 Chan. Cases, 94. Pasch. 34 Car. 2. Harding v. Edge.

Comyns's
Rep. pl.
277. in the
case of Cook
v. Cook, in
the exche-
quer.

8. There lies *no appeal to the house of lords* from a decree on the statute for charitable uses; and lords commissioners seemed to be of opinion, that a *decree on exceptions* to a decree of commissioners for charitable uses is final by the act of parliament, and that there could be *no re-hearing*. 2 Vern. 118. pl. 116. Mich. 1689. Saul v. Wilson.

9. If the lord of a manor should erect a mill, and convey it to trustees, to the intent that the inhabitants might have the convenience of grinding there; the inhabitants shall not be admitted to sue here in the attorney-general's name; per Ld. Keeper. 2 Vern. 287. in pl. 355. Mich. 1700.

10. The testator devised an annuity out of his lands for the maintenance of Watford-school. Upon a bill in equity exhibited by the attorney-general in behalf of the charity, it was insisted, that *all the tenants* of the lands charged, should be *made parties*, but decreed that they should not, because every part of the land is chargeable, and the charity ought not to be put to this difficulty; but if the tenants seek a contribution, they may make them parties to the information, or help themselves by such course as they think fit. 1 Salk. 163. pl. 2. in Canc. 1712. Attorney-General v. Shelly.

Wms.'s
Rep. 599.
Hill.
1719. At-
torney-Ge-
neral v. Wil-
burgh & al.
S. P.

11. Bill to establish a will, and to perform several trusts, some of them relating to charities; the bill was brought by some of the trustees against other trustees, and several cestui que trusts. An objection was made for *want of parties*, for that there being several charities given by the will to persons uncertain, not capable of suing or being sued, and consequently cannot be brought before the court, therefore the attorney-general on their behalf ought to have been made a defendant to take care of these charities; and if a decree should be made in this cause, it would not be final, but the attorney-general might afterwards *bring an information on behalf of those charities, and set aside this decree, and therefore he ought to be made a party. Per Parker C. I think in his case the attorney-general need not be made a defendant. It is true, where a bill is brought on behalf of such a charity to establish it, it must be in the name of the attorney-general ex necessitate rei, because there are no certain persons intitled to it who can sue in their own names, but in this case there is no such necessity; for some of the trustees of the charity are made defendants, and there may be a decree to compel an execution of the trusts in the will relating to those charities, and if there could be any collusion between the parties in relation to the charity, it is true, the attorney-general notwithstanding a decree, may bring an information to establish the charity and set aside the decree, and I think he might do the same thing though he were

* [501]
Ibid. The
reporter says,
via. Note,
Parker C.
seemed to
take a differ-
ence where
trustees of
the charity
are appointed
by the donor,
and where
no trustees
are appoint-
ed, but the
lands devised
immediately
to charitable
uses. In the
latter case
there can be
no decree,
unless the
Attorney-
General be
made a party,
but other-
wise where
trustees are
appointed by
the donor.
This pro-

ceeded to
hearing, and
objections
over-ruled
per Parker
C.

made a defendant in case of collusion between the parties; but he seemed to admit, that *where an estate is devised to trustees for charities to persons certain, who are capable to sue or be sued, such persons ought to be made defendants as well as other cestui que trust.* A 2d objection for want of parties was, that *one of the trustees was not brought to hearing.* But it was answered, that the trustee who is not brought to hearing is named a defendant in the bill, but being beyond sea is not amenable by the process of the court, and therefore the plaintiff may proceed without him, otherwise there would be a failure of justice; besides, that very trustee is one of the plaintiffs in the cross cause, and so is before the court, quod fuit concessum; per Parker C. MS. Rep. Trin. 5 Geo. in Canc. Monill v. Lawson.

12. Urged, that in case of a charity, where the *most speedy and least expensive method* ought to be pursued, issue ought not to be directed, but the court ought to decree upon the proofs. MS. tab. March 25, 1721. Bishop of Rochester v. Attorney-general.

For more of Charitable Uses in general, see *Portmain* (A. 2) pl. 11. the stat. of 9 Geo. 2. cap. 36. and other proper titles.

Chauntery.

Fol. 387.

(A) *By whom it may be made.*

Chauntries
were dis-
solved by
statutes of
H. 8. & E. 6.

[1. **A** Man may make a chauntery by licence of the king, without the ordinary, for the ordinary hath nothing to do with the making thereof. 9 H. 6. 16.]

[502]

(B) *In what Place.*

As to
chauntries,
see Godolp.
Report 329.

[1. **I**T may be founded in a cathedral church; and also in any other church. 9 H. 6. 17.]

Report 329. L. 6. 331. L. 8. &c. cap. 29.

Chimin Common.

(A) Chimin Common. *What shall be said a Common Highway.*

Fol. 390.

[1. **I**F there be a common highway for all the king's subjects, and it hath been *used time out of mind, when the way has been foundrous, for the king's subjects to go by outlets upon the lands next adjoining, the way lying in the open field not inclosed*; these outlets are part of the way; for the king's subjects ought to have a good passage, and the good passage is the way, and not only the beaten track; for if the lands adjoining be sowed with corn, the king's subjects (the way being foundrous) may go upon the corn. Trin. 10 Car. B. R. per curiam, upon a trial at bar upon an information against SIR EDWARD DUNCOMB.]

Cro. C.
366. pl. 3.
S. C.

[2. If there be a water, which is a highway, which water by the increase or force thereof *changes its course upon the ground of another*, yet he hath a highway also over there where the water is, as he had before in the ancient course; so that the lord of the soil cannot disturb this course made de novo. 22 Ass. 93. said to be adjudged in the eire of Nottingham.]

Fitz. Barre,
pl. 302.
S. C.

3. A way leading to any market town, and common for all travellers, and communicating with any great road, is an highway; but if it lead only to a church, or to an house or village, or to fields, it is a private way; per Hale Ch. J. but it is a matter of fact, and depends much on common reputation. Vent. 189. Hill. 23 & 24 Car. 2. B. R. Austin's case.

4. Highway is the genus of all public ways, as well cart, horse, and foot-way, and yet indictment lies for any one of these ways, if they are common to all the queen's subjects, if they have occasion to pass here, viz. if it be a foot-way common to all, or horse and prime-way; but these are not *alta via regie*; for that it is the great highway, common to cart, horse, and foot, that please to use it; per Holt Ch. J. 6 Mod. 255. Mich. 3 Ann. B. R. The Queen v. Saintiff.

1 Salk. 359.
pl. 8. the
Queen v.
Saintiff,
S. C. but
not S. P.

5. If a vill be erected, and a way laid out to it, if there be no other way but that to the vill, not material *quo animo* it was laid out, it shall be deemed a publick way. No one living in a hundred shall be allowed an evidence for any matter in favour of that hundred, though so poor as upon that account to be excused from the payment of taxes, because, though poor at present, he may become rich; per Parker Ch. J. 10 Mod. 150. Hill. 11 Ann. B. R. The Queen and Inhabitants of Hornsey.

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6. *Communis strata* and *via regia* are synonymous expressions, and signify the same thing, as the word (*strata*) is now used; per Parker Ch. J. 10 Mod. 382. Hill. 3 Geo. 1. B. R. The King v. Hammond.

7. A *navigable river* is esteemed an highway; per Parker Ch. J. in delivering the opinion of the court. 10 Mod. 382. Hill. 3 Geo. 1. B. R. in case of the King v. Hammond, cites Fitzh. 279. tit. Challenge.

(B) Who ought to repair it.

Cro. C. 366. pl. 3. S. C. it was proved that though he had made a causeway reasonably good at his own charge for horsemen, yet carts and coaches might not pass, nor could meet for the straitness thereof, nor could go besides the way; and as to his being chargeable

[1.] IF there be a common highway, which time out of mind hath been used to be repaired by the country, and after 7. & that both lands not inclosed, next adjoining to the highway of both sides of the way for his singular profit, incloses his lands of both sides the way by hedge and ditch, he by this thenceforth hath taken upon himself the reparation of the highway, and hath freed the country from the reparation thereof; so that he himself at all times after, where there shall be need, ought to repair it. Trin. 10 Car. B. R. in an information against SIR EDWARD DUNCOMBE, resolved per curiam upon evidence at the bar upon such an information; and it is not sufficient for him to make the way as good as it was at the time of the inclosure, but he ought to make it a perfect good way, without having any respect to the way as it was at the time of the inclosure; and then it was said that it was so resolved by all the judges 6 Jac. and 19 Jac. For when the way lay in the open fields not inclosed, the king's subjects, when the way was bad or foundrous, used to go for their better passage over the fields adjoining, out of the common track of the way, which liberty is taken away by the inclosure.]

to the repairs now, by reason of this inclosure, whereas the parish was chargeable before for the reparations, Noy said it was so resolved in the 6 & 19 Jac. upon conference with all the justices of England, which Richardson Ch. J. affirmed.——Sid. 464. pl. 8. Trin. 22 Car. 2. B. R. cum S. C. in the case of the King v. Sir Nich. Staughton; and there the chief justice said, and it was not denied, that if a man incloses land of one side which was anciently inclosed of the other side, he that makes such new inclosure shall repair all the way; but if there had been no ancient inclosure of the other side, then he should repair but one half of the way; but if he makes a new inclosure on both sides of the way, there he shall repair the whole way.——And if one incroaches upon the highway, he is chargeable to repair the said way so long as the incroachment continues; but as soon as he leaves the incroachment open to the way again, so that the incroachment ceases, he shall be discharged from repairing the said way for the future. But if one is bound to repair a highway ratione tenuræ of any lands, though he leaves them open to the way, yet he is always bound to repair the way; per Kelyng Ch. J. 2 Saund. 160, 161. in S. C.——By Roll Ch. J. Sty. 364. Hill. 1651. all highways of common right are to be repaired by the inhabitants of that parish in which the way lies; but if any particular person will inclose any part of a way or waste adjoining, he thereby takes upon himself to repair that which he has so inclosed.——Mar. 26. pl. 62. Trin. 15 Car. B. R. S. P. accordingly per cur. in case of the King v. the Inhabitants of Shoreditch.——12 Rep. 33. Pasch. 7 Jac. Anstaya, that of common right all the country ought to repair it, because they have their ease and passage by it; but yet some may be particularly bound to repair it.——The inhabitants of every parish of common right ought to repair the highways, and therefore if particular persons are made chargeable to repair the said ways by a statute lately made, and they become insolvent, the justices of peace may put that charge upon the rest of the inhabitants; per Holt Ch. J. Ld. Raym. Rep. 725. Mich. 10 W. 3. B. R. Anon.——2 Ld. Raym. Rep. 1170. Trin. 4 Ann. Holt Ch. J. cited Duncomb's case supra.——Keb. 894. pl. * 60. S. C. cited per cur. as resolved that it is not sufficient that such new way is better than ever the former was, but he must keep it in sufficient repair for the king's people to pass.

* [504]

[2. An

[2. An owner of land, who is no occupier thereof, cannot be charged to repair a common way, but only the occupier. Hill. 11 Car. B. R. in one FOSTER'S CASE, per curiam, upon a motion for a prohibition to the marches of Wales, upon an information there preferred in such case against the owner.]

3. It was held in B. R. that he who has land next adjoining to the king's highway, is bound to cleanse the dykes without any prescription. Br. Nufance, pl. 28. cites 8 H. 7. 5.

4. Contra of him who has land which is not adjoining, but other land is between him and the way, he is not so bound unless it be by prescription. Ibid.

5. And, per Keble, a man is not bound to lop his trees which incumber the way, therefore it seems that another may do it, and the soil and franktenement of the way is to those to whom it adjoins; but he who has land adjoining to a bridge, is not bound to do it, unless it be by prescription. Ibid.

6. A hamlet within a parish cannot be charged of common right to repair a highway, except it be by prescription, or some other special reason, but a vill may be; per Roll Ch. J. Sti. 163. Mich. 1649. B. R. The Inhabitants of Mile-end in the Parish of Stepney.

7. If a man has 8 plough-lands, he ought to find 8 carts for 6 days although his land be pasture. Raym. 186. Pasch. 22 Car. 2. B. R. Frere's case.—He had 1700 acres of meadow.

8. Every * parish of common right ought to repair the highways, and no agreement with any person whatsoever can take off this charge which the law lays upon them. Nota. Vent. 90. Trin. 22 Car. 2. B. R. Anon.

* Unless there be some special matter to fix it upon others; per

Hale Ch. J. Vent. 183. Hill. 23 & 24 Car. 2. B. R. In Austin's case.—(But the reporter adds a quære, why not the county? as in the case of common bridges, and cites 2 Inst. 701.)

Unless a † particular person be obliged by prescription or custom; but private ways are to be repaired by the village or hamlet, or sometimes by a particular person. 1 Vent. 189. per Hale Ch. J. in Austin's case.

† Mar. 26. pl. 62. Trin. 15 Car. B. R. The King v. the Inhabitants of Shoreditch.

9. An information was brought against the defendant for not repairing of a highway, ratione tenuræ, between Stratford and Bow. It was tried at the bar by an Essex jury. The evidence for the king was that *Maud the empress gave certain lands to the abbess of Barking to repair this way, that the abbess, &c. sold those lands to the abbot of Stratford, who, by the consent of his convent, charged all his lands for the repair of the way; and thus it stood till the dissolution, &c. Then all the lands of the abbot of Stratford, being vested in the crown, were granted to Sir Peter Mewtis, who held them charged for repairing the way, and from him, by several mesne conveyances they came to the defendants.* This was proved by several witnesses living in other parishes, none being admitted to give evidence who lived in either of the said parishes of Stratford or Bow. But it was said, for the defendants, that no lands shall be chargeable for the repairing this highway, ratione tenuræ, but such which were originally given for that purpose, and so the defendants could not be guilty, unless it was proved that they had some

of those lands in possession which were given by the empress to the abbess of Barking, and that no other lands formerly belonging to the abbot of Stratford were liable, but such which he bought of the said abbess. The court was of opinion, that upon this evidence *all the lands of the abbot were liable to repair* this way, and directed the jury accordingly, who found for the plaintiffs. 4 Mod. 48. Mich. 3 W. & M. B. R. The King and Queen v. Buckenridge & al'.

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10. Per Holt Ch. J. The inhabitants of every parish, of common right, ought to repair the highways; and therefore if *particular persons are made chargeable* to repair the said ways by a statute lately made, and they *become insolvent*, the justices of peace may put that charge upon the rest of the inhabitants. Ld. Raym. Rep. 725. Mich. 10 W. 3. B. R. Anon.

11. Every parish of common right ought to repair their highway; but *by prescription one parish may be bound to repair the way in another parish*; per Holt Ch. J. 12 Mod. 409. Trin. 12 W. 3.

12. Though the lord of a manor who is bound to repair a bridge or highway *ratione tenure*, may, upon several alienations of several parcels, agree to discharge those that purchase of him of such repairs, yet *that will not alter the remedy for the publick*, but will only bind the lord and those that claim under him; and no act of the proprietor will apportion the charge, whereby the remedy for the publick benefit should be made more difficult. 1 Salk. 358. Pasch. 3 Ann. The Queen v. the Dutchess of Buccleugh & al'.

13. And though a manor subject to such charge *comes into the hands of the crown*, yet the duty continues upon it; and any person claiming afterwards under the crown, the whole manor, or any part of it, shall be liable to an indictment or information for want of due repairs. 1 Salk. 358. S. C.

(C) Privileged from Duty. Who.

2 Lev. 139. 1. *Clergymen* are liable to the repairs of the highways, and judgment accordingly. Vent. 273. Trin. 26 Car. 2. B. R. Dr. Webb v. Batchillor.

Freem. Rep. 396. pl. 514. S. C. the court held that they are chargeable to all publick charges. — Ibid. 488. pl. 667. S. C. adjudged; and Hale Ch. J. said, they would not allow the dispute of so long a settled point; for in Sir Nicholas Hide's time, it was resolved that the clergy are liable thereto.

The king's moneyers of the mint are not exempted from doing duty to the highways; adjudged. Cumb. 10. Hill. 1 & 2 Jac. B. R. Brent v. Whitcomb, S. C.

2. An exemption by the king's letters patents made before the 2 & 3 Ph. & M. cap. 8. are not sufficient to exempt lands chargeable to send men for the repairing highways, from the charge of repairing them, which lands by the said statute of Ph. & M. and other subsequent statutes are chargeable to send men for that purpose; and judgment was given accordingly. 3 Mod. 96. Hill. 1 Jac. 2. B. R. Bret v. Whitcot,

Hill. 1 & 2 Jac. B. R. Brent v. Whitcomb, S. C.

(D) Offences in Highways punished. How.

1. NO lord can punish *purpresture* upon a highway, unless he be *lord of both sides*. Kelw. 141. a. pl. 11. says it was so said in that plea, and affirmed by Shard. Cases in Itin. in time of E. 3.

2. If any particular person after the nuisance made, has more [506] *particular damage* than any other; in such case, and because of this particular injury, he shall have particular action upon the case. 7 Rep. 73. cites 27 H. 8. 27. a.

Per Vaugh. Ch. J. Vaugh. 341. —S. P. per Fitzh. J.

Br. Actions sur le Case, pl. 6. cites S. C. —As if he and his horse fall into it, whereby he receives hurt and loss. Co. Litt. 56. a. says, that it was so resolved in B. R. and in the margin cites 27 H. 8. 27. —And in the case of Fincux v. Hovenden, Cro. E. 664. Pasch. 41 Eliz. Coke attorney-general cited the S. P. adjudged in the same year of 27 H. 8. Bendlows v. Kemp.

Br. Action sur le Case, pl. 93. cites 5 E. 4. 3. that he shall not have action against him who ought to repair it; for that is the people, but it shall be reformed by presentment. —So by Baldwin Ch. J. if a man stops the king's highway, so that a man cannot pass from his house to his close, he shall not have action on the case, but he shall be punished by the lect. Ibid. pl. 6. cites 27 H. 8. 26, 27.

3. Case lies not for *hindering a man's passage* in a common highway, because he has no more damage than others of the king's subjects; but it must be by indictment. Comb. 180. Trin. 3 & 4 W. & M. in B. R. Pain v. Partridge.

3 Mod. 289. Pain v. Partridge, S. C. adjudged for the defendant. —

1 Salk. 12. pl. 1. S. C. held accordingly. —Show. 243. S. C. Mich. 2 W. & M. adjournatur. Ibid. 255. S. C. adjudged for the defendant.

4. *Indictment* against 2 defendants who were *overseers* of the highway, for not repairing, or causing to be repaired, the highways, and quashed; because an indictment for not repairing, *must always be against the parish*, the overseers not being bound to repair the ways, but only to give notice to the parish to come and repair them. 12 Mod. 198. Trin. 10 W. 3. The King v. Dixon & Hollis.

(E) Proceedings, Pleadings, and Judgment.

1. **I**ndictment was for not repairing a way which he ought to do in Blackacre in D. *ratione tenuræ*, without saying *tenuræ sue*. And by the opinion of the court it was naught; for another may have the land. Noy, 93. Anon. cites 5 H. 7. 3.

This exception was disallowed, and it was said, that the precedents are

generally so. Vent. 331. Trin. 30 Car. 2. B. R. The King v. Sir The. Fanshawe.

2. If a man is bound to repair a way *ratione tenuræ talis terræ*, in a presentment or in a plea, he need not *allege title of prescription*, because a prescription is *implied* in the estate of inheritance in the land. Kelw. 52. pl. 4. Trin. 19 H. 7. Anon.

But where a man is bound to repair such way *ratione residentie*,

there he must of necessity *allege a prescription*. And this diversity was admitted good; per tot. cur. Kelw. 52. ut sup.

3. G.

3. G. was indicted for *stopping the highway*, and the indictment was *not laid to be contra pacem*. And Cook said, that for a misfeasance it ought to be *contra pacem*; but for a non-feasance of a thing, it was otherwise; and the indictment was for *setting up a gate in Osterly park*; and exception also was taken to the indictment for want of addition; for *vidua* was no addition of the *Lady Gresham*; and also *vi et armis* was left out of the indictment; and for these causes she was discharged, and the indictment quashed. Godb. 59. pl. 71. Mich. 28 & 29 Eliz. B. R. Lady Gresham's case.

[507] 4. An indictment was of a nuisance to a *horse-way*, whereas it ought to be to the queen's or king's highway, or to the highway, and therefore it was quashed. Cro. E. 63. pl. 8. Mich. 29 & 30 Eliz. B. R. Madox's case.

5. The defendant was presented in a leet, for that he had *diverted the queen's highway* within the leet, to the nuisance of the queen's subjects. The court agreed that the presentment is void, because a highway cannot be diverted as a course of water may be, but may be *obstructed or stopped*; but a way is not diverted when it is stopt, and another way made in another place. And. 234. pl. 251. Pasch. 32 Eliz. Agmondesham v. Cornwallis.

6. K. was indicted for *stopping quandum viam valde necessarium for all the king's subjects there passing*; exception was taken because it wanted the word *regiam*, and said that the word (*necessarium*) does not imply any [such] matter; for a foot-way is necessary. Besides, the party had no addition; and for these reasons he was discharged. 4 Lc. 121. pl. 243. Trin. 32 Eliz. B. R. Keene's case.

7. Two were indicted for *incroaching upon the highway*, and the indictment was *et unum tenementum ibidem erectaverunt*, where it should be *erexerunt*; for there is no such Latin word as *erectaverunt*; and it was not *anglice*, did erect, which had been good, and for this cause it was discharged. Cro. E. 231. Pasch. 33 Eliz. B. R. Chambers & Johns.—Alias, the Queen v. Chambers & Johns.

8. Indictment for not repairing a bridge, was *debent & solent reparare pontem*, &c. It was moved that the indictment was insufficient, because it is *not alleged that the bridge was over a water, and not needful that it be amended*. Secondly, it did not appear in the indictment *that the said bridge was ruinous and decayed*. Thirdly, the indictment is, that the defendants *debent & solent reparare pontem*, and it is not shewed that their charge of repairing of the same is *ratione tenuræ*, and cites 21 E. 4. 38. where it is said that a prescription cannot be, that a common person ought to repair a bridge, unless it be said to be *ratione tenuræ*, but it is otherwise in case of a corporation; and the indictment was quashed. Godb. 346, 347. pl. 441. Trin. 21 Jac. B. R. Bridges and Nichols's case.

9. Exceptions were taken to an indictment for not repairing an highway. First, because he did *not shew who were supervisors*; sed non allocatur. Secondly, because it did not shew *the day nor year of the offence*, and held not material; because it appears that it

2 Roll. Rep.
S. C. by
name of
Notting-
ham's case,

was before the indictment, that he did not attend with a cart *such a day appointed by the supervisors*. Thirdly, the statute * 1 & 2 *M. cap. 3.* is *highway leading to a market town; & non allocatur; because every highway leads from town to town, and cites 6 E. 3. 33.* Fourthly, it is alleged that *T. B. habens tantum terre* committed the offence, and the words of the statute are *occupy, &c.* so that a man is not chargeable if he does not occupy his land, though it be his frank-tenement. But it was agreed that if a man *suffers his land to lie fresh*, it shall not excuse him. But the judges doubted of the 4th exception, and commanded the defendant to procure a *certificate of his conformity*, before they would quash the indictment. Palm. 389. Mich. 21 Jac. B. R. Tho. Bole's case.

alias Tho. Bole's case.
* It seems it should be the 2 & 3 P. & M. cap. 8.

10. H. was indicted for *stopping the king's highway in Kensington*, but does not allege any butalls of the king, viz. leading from such a village to such a village, &c. And by Jones J. it needs not, because the nuisance is in the king's highway, which is intended to go through all the realm, but otherwise it should have been of another common way, to which Dodderidge and Whitlock agreed. Noy, 90. Mich. 2 Car. B. R. Halsell's case. material, but the omitting the word (*communis*) is ill; but the court left them to a writ of error, and judgment † pro rege. 2 Keb. 728. pl. 8. Hill. 22 & 23 Car. 2. B. R. The King v. Glasdon inhabitants.

So in an indictment for not repairing a highway, the court conceived, that the omitting the terminus a quo is not error, and judgment for the King.

The indictment did not set forth, *from what place to what place* the highway led in which the nuisance was said to be committed. It was answered, that a highway has no terminus a quo, nor terminus ad quem, and the indictment held good. 10 Mod. 383. Hill. 3 Geo. 1. B. R. The King v. Hammond.—Ibid. Arg. says, that a highway is infinite, and cites 10 W. 3. The King v. Thompson.

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11. L. was indicted for *not repairing of an highway*; the indictment above was quashed, because it is *not shewed of what place the defendant was an inhabitant*. Noy, 87. Mich. 2 Car. B. R. Lucye's case.

12. H. was indicted for *not paving the king's highways* in the county of M. in St. John's-street, *ante tenementa sua*, but because the indictment did *not set forth how he became chargeable* to the same, nor that he *dwelt there*, nor that he had any tenement there, besides, if he had, yet it might be that his lessee dwelt in the house, and so the lessee ought to have amended the highway; and for these uncertainties the indictment was quashed. Godb. 400. pl. 481. Pasch. 3 Car. B. R. Serjeant Hoskins's case.

13. In an indictment for not repairing a way which he ought *ratione tenurae of certain lands* in Ashton, and does not say *ratione tenurae suae*, and if another has the land, it is no reason to indict him; and of this opinion was the court. Lat. 206. Trin. 3 Car. Anon.

Noy, 93. S. P. accordingly, and seems to be S. C. and cites 5 H. 7. 3. accordingly.

ingly.—Vent. 331. Trin. 30 Car. 2. B. R. The King v. Fantham, S. P. & S. C. cited, sed non allocatur; for the precedents generally are *ratione tenurae*, without saying (*suae*.)

14. Upon a presentment against T. B. for *erecting a brick wall, and thereby straitening the highway*, Mr. Attorney said, that it could not be arrented, unless there was an inquiry per ministros forrestas, si sit competens passagium; for if it be not, it is a nuisance

nusance in which the subject is so far interested, that the king cannot dispense with it. Jo. 277. 8 Car. in Itinere Windfor. Browne's case.

15. Information for *stopping* a highway; it was said there was a common highway for horse, foot, and carriages, in such a lane, leading to divers market towns, and the defendant *with hedges and ditches* stopped it. The defendant confesses the highway, but *say it was so foul and drowned with water and dirt that passengers could not pass, and that for ease of the passengers, J. S. seized of a close adjoining to it, laid out another way more commodious for the people, and before the laying out of it a writ of ad quod damnum issued, to inquire whether it were to the damage of, &c. if the king should grant such licence to the defendants; and an inquisition was taken, that it was not to the damage, &c.* It was moved that this plea was ill, both for matter and form, because it did not appear by what authority J. S. did it; for it is but at his pleasure, and he may stop it when he will, and by that laying out the subjects have not such interest therein as they may justify their going there; nor is it such a way as inhabitants are bound to watch, or to make amends if a robbery be done there; nor is any one bound to repair it; and the pleading of the ad quod damnum, and the inquisition upon it, are to no purpose when he does *not plead, that he obtained the king's licence; and judgment accordingly.* Cro. C. 266. pl. 16. Trin. 8 Car. B. R. The King v. Ward.

16. In an *information against the inhabitants of S. for not repairing the highway*, and the issue was, whether they ought to repair it or no? *Some of the inhabitants would have been witnesses to prove that some particular persons, inhabitants, lying upon the highway, had used, time out of mind, to repair it, but were not permitted by the court, because they were defendants in the information, wherefore the jury found that the inhabitants ought to repair the way.* Mar. 26, 27. pl. 62. Trin. 15 Car. B. R. The King v. the Inhabitants of Shoreditch.

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17. Indictment for not repairing a highway was quashed, for that it *set forth, that the defendant ought to repair it, by reason of his tenements, when it should have been, that he, and all those whose estate he has in the tenements, used to repair; or, that by reason of the tenure of his tenements he ought to repair.* Sty. 400. Hill, 1652. B. R. Anon.

18. The defendants were indicted for not repairing a highway, and a *verdict found against them.* The court was moved that a good fine may be set upon them, because the *way is not yet amended, and a traveller that passed that way has lost his horse since the trial, the way being so bad that the horse broke his leg.* The other side moved to respite the fine, because there was a contest between this parish and another, which of them ought of right to repair the way, and in regard this parish is very poor; besides, the way cannot be amended until the summer, and then it shall be done; but Roll Ch. J. ordered a distringas to levy a fine of 20 l. of

of the parishioners for not repairing it. Sty. 366. Hill. 1652. B. R. Stoneham's Inhabitants case.

19. In an information for not repairing a way in B. from A. to D. in the parish of C. The defendant pleaded, that the said way in the parish of C. is in the parish of B. and that the inhabitants of B. ought to repair it; whereupon it was demurred, and the court conceived the plea repugnant, and ordered the defendants to repair by consent, and that if the others ought to repair part, they shall refund so much as shall be after found due on the trial, otherwise the court would have given judgment. 1 Keb. 277. Pasch. 14 Car. 2. B. R. The King v. Yarenton Inhabitants (in Oxfordshire).

given, though upon an ill issue. It was insisted, that no judgment could be given, it not being found who ought to repair; but per cur. the judgment shall be, that the defendants go quit, and that the other villa, between whom the issue was, should repair.——3 Salk. 392. pl. 1. S. C.

Sid. 140. pl. 14. Pasch. 15 Car. 2. B. R. the S. C. the information ought not to be quashed till it be found who ought to repair it; and then judgment shall be

20. Upon an information for not repairing a highway, the issue was, *quod non reparare debent*; but though it was an ill issue, yet the court would not quash it till tried, to the intent to know who ought to repair it. And afterwards it was found non debent reparare, but find not certainly who ought to repair it. In this case no judgment shall be given, otherwise if they had found who ought to repair; for then judgment should be given, though the issue be ill, as the court held clearly; and they were of opinion, that the defendants should go quit, and that the other vill, who directed this issue, and who of right ought to repair, should repair. 1 Sid. 140. Pasch. 15 Car. 2. B. R. The King v. Yarnton Inhabitants in Oxfordshire.

The issue being by a special agreement, the court conceived the verdict well enough, though it be not found who ought to repair, and judgment for the defendant. 1 Keb. 514. S. C. —

Sid. 140. Ibid. reports, that Twisden J. said, that he was counsel in a like case for the vill of Camberwell.

21. The inhabitants of S. were indicted for digging in the highway, but did not say in what town, parish, or village the place was, and therefore they moved to quash it; but the court denied, unless there was a certificate of amendment. 2 Keb. 221. pl. 68. Pasch. 19 Car. 2. B. R. The King v. Shelderton Inhabitants.

22. Information against one for stopping of the highway, the word was *obstupabat*; it was proved in evidence, that he plowed it up, and resolved it did well maintain the information. Vent. 4. Hill. 20 & 21 Car. 2. B. R. Griesley's case.

23. S. was convicted for not repairing a highway, viz. that he, and all those whose estate he has, ought to repair the said way *ratione tenuræ*; and it was adjudged ill, because it is by way of prescription, where it ought to be by way of custom. 1 Sid. 464. Trin. 22 Car. 2. B. R. The King v. Sir Nich. Staughton.

* [510] This case was upon a presentment by a justice of peace on his own view, and that S.

ought to repair *ratione tenuræ* of certain lands, parcel of the said piece of land (mentioned before) called Stoke-common, by the said S. out of the said common highway, inclosed and incroached, and which, time out of mind, had been part of the said highway. The defendant pleaded, that the inhabitants ought to repair the said highway and traversed, absque hoc that he ought to repair the said way *ratione tenuræ*, &c. and upon demurrer it was held, that the *ratione tenuræ* was ill, and that it ought to have been *ratione coarctationis* of the said way, and that defendant did well in traversing the *ratione tenuræ*, and could not do otherwise; and adjudged for the defendant. 2 Saund. 160. The King v. Staughton.

But see tit.
Indictment
(M) pl. 18.
contra.

24. In an indictment for not repairing *quandam altam viam*, the word (*communem*) was omitted, and therefore held ill; but the omitting the terminus a quo was conceived not material. 2 Keb. 728. pl. 8. Hill. 22 & 23 Car. 2. B. R. The King v. the Inhabitants of Glaston.

25. In an indictment for *erecting posts and rails*, in a high-way, it was held necessary to *prove that the party indicted set them up*; for a continuance of them, or *not suffering them to be removed*, would not serve. 1 Vent. 183. Hill. 23 & 24 Car. 2. B. R. Austin's case.

3 Keb. 28.
pl. 50. The
King v.
Thrower,
S. C. and it
being not
said pro in-
habitantibus
parochiæ,
but pro om-
nibus subdi-
tis domini
regis, the
court would
not quash it
without
pleading.—
Indictment
for stopping
a way to the
church, did

26. An indictment was for *stopping a common way to the church of Whithy*. It was objected that an indictment would not lie for a nuisance in a church-path; but suit might be in the ecclesiastical court; besides the damage is private, and *concerns only the parishioners*; and where there is a foot-way to a common, every commoner may bring his action if it be stopped; but in such case there can be no indictment. Hale Ch. J. said that if this were alleged to be a *common foot-way to the church for the parishioners*, the indictment would not be good; for then the nuisance would extend no further than the parishioners, for which they have their particular suits; but for aught appears this is a *common foot-way*, and the church is *only the terminus ad quem*, and it may lead further, the church being expressed only to ascertain it, and it is *said ad commune necumentum*, wherefore the rule was that he should plead to it. 1 Vent. 208. Pasch. 24 Car. 2. Thrower's case.

not lay it to be *communis via*, yet per cur. it is good enough; and per Jones J. it is good enough, though there wants *vi & armis*, because he who is supposed to stop the way is owner of the land. Poph. 206. Mich. 2 Car. B. R. Hebborn's case.

Cro. C. 584.
Leyton's
case.—2
Show. 60.
pl. 46.
Pasch. 31
Car. 2.
B. R. Anon.
S. P.

27. The course of B. R. upon an indictment for stopping a way, is that the offender is admitted to a fine upon his submission before verdict, if there be a *certificate* that the way is repaired; but if the party be convicted by verdict, such certificate will not serve, but the party ought to cause a *constat* to issue out to the sheriff, who ought to return that the way is repaired, because the verdict, which is a record, ought to be answered with matter of record. Raym. 215. Pasch. 24 Car. 2. B. R. Houghton's case.

12 Mod.
212. pl. 10.
Anon. S. P.
and seems to
be S. C.—
3 Keb. 301.
pl. 36. The
King v. St.
Andrew's

28. If a *parish, &c.* be indicted for not repairing a highway within their precinct, they *cannot plead not guilty, and give in evidence that another ought to repair it*; for they are chargeable de communi jure, and if they would discharge themselves by laying it elsewhere, they must plead it. 1 Vent. 256. Pasch. 26 Car. 2. B. R. Anon.

Holbourn, S. C. & S. P. by Hale Ch. J. accordingly. — 3 Salk. 183. pl. 3. S. C. & S. P. accordingly; but that, where a private person is indicted for not repairing, he may give in evidence that another is to repair, because he is not bound of common right as the parish is.

If you plead *not guilty*, it goes to the repair or not repair; but if you will discharge yourself, you must do it by *prescription* or *ratione tenuræ*, and say that such an one *ratione tenuræ*, or such a part of the parish, hath always used time out of mind, &c. 1 Mod. 112. Pasch. 26 Car. 2. B. R. Leatherlane's case.

29. An indictment in a leet was for *stopping a common highway leading from a place called Up-end*. Exception was taken, for that every highway must be from some publick place; but per cur. this may be well enough; but because it was *not set forth where the stopping was*, the indictment was quashed. 3 Keb. 644. pl. 88. Pasch. 28 Car. 2. B. R. Ayrell's case.

* 30. Replevin of taking of 5 oxen. The defendant makes cognizance as bailiff to the lord of the leet, because the plaintiff was amerced there for *not scouring a ditch in an highway*; and the plaintiff demurred, because the statute of 18 Eliz. cap. 9. gives the forfeitures for highways to the surveyors of the highways; but adjudged by all the justices for the defendant, because the *party may be punished in the leet, and also by this statute for divers causes*. Raym. 250. Trin. 30 Car. 2. Stephens v. Hayns.

31. Indictment for *not repairing a way to a church*, and says, the defendants ought to repair the same, but does *not say how, whether by reason of tenure, or otherwise*. It was held naught, because, prima facie, and regularly, the parish or county ought to do it of common right. 2 Show. 201. pl. 206. Pasch. 34 Car. 2. B. R. The King v. Warwick (Mayor, &c.).

32. A presentment was at a court-leet for *not repairing a certain pair of stairs leading to the Thames*. Several exceptions were taken to the form and manner of the presentment; but the court would not quash it, because it was for not repairing the highway. 2 Show. 455. pl. 420. Mich. 1 Jac. 2. B. R. The King v. the Inhabitants of Limehouse.

33. A justice of P. on his view presented a highway to be out of repair, and the presentment being removed by certiorari into B. R. the defendants pleaded *not guilty*. The jury found a special verdict that the way was out of repair, but that it was *not a highway*, but a private way. Holt Ch. J. held that the verdict was against the defendants, because upon their plea of not guilty they give in evidence that it is *no highway*, but that matter ought to be *pleaded specially*; and he held that where a justice of peace presents a highway upon his view to be out of repair, there the parties are *estopped to plead that it is in repair*. But the other judges were against him in both points, and held that this might be given in evidence upon the general issue, and that the parties might *traverse the non-repairing*, though the presentment was upon view; for that cannot be a greater estoppel than the finding of a grand jury who are upon oath. Carth. 212, 213. Hill. 3 W. & M. B. R. The King v. Hornsey Inhabitants.

34. If a presentment be made by a justice of peace, upon his own view, that a highway is out of repair, and the defendants *plead specially* to such a presentment, viz. that they ought not to repair, they likewise must *show who ought to repair*, or else the plea is ill. Agreed per tot. cur. and said to have been so adjudged by Hale Ch. J. Carth. 213. Hill. 3 W. & M. B. R. in case of the King v. Hornsey Inhabitants.

35. The being of a highway is matter of supposal, and must be denied in pleading; and so held in the case of Leather-lane, per Holt

S. C.
1 Show.
270. Trin.
3 W. & M.,
ordered to
stay.
4 Mod. 38.
S. C.—12
Mod. 13.
S. C. &
S. P.

4 Mod. 38.
S. C. held
accordingly.
—12 Mod.
13. S. C.
accordingly.

Holt Ch. J. And per Eyres J. you may give it in evidence; for it is the same as no park or no warren. In trespass it is not guilty. The presentment is but in nature of an indictment. Per cur. ordered to stay. Show. 291. Trin. 3 W. & M. The King v. Hornsey.

36. By 3 & 4 W. & M. cap. 12. *the prosecution is to be in the proper county, and not removed.*

Comb. 396.
The King
v. the Inha-
bitants of
Ireton in
Cumber-
land, S. P.
accordingly.

37. *Indictment upon the statute of P. & M. for not working at the highways upon notice.* Holt said, the better opinions had been, that you can give nothing in evidence upon not guilty, but that the ways are in repair. Cumb. 312. Hill. 6 W. 3. B. R. The King v. Terrell & al'.

But if it be against a particular person, he may give in evidence that others ought to repair it.

[512]

38. *Error of a judgment upon an indictment at the quarter-sessions, for non-repairing a highway between A. and B. in the parish of R. and the judgment was, that such a sum extrahatur & levetur to repair the said way, nisi it were repaired by such a time.* It was objected that the judgment was *preposterous*, extrahatur & levetur, instead of the natural way of *levetur & extrahatur*; and for this exception the judgment was reversed, and compared to debt upon bond for 10 l. if judgment were *ideo consideratum est, quod habeat executionem de præd. 10 l. & recuperet*; per cur. it would be error. 12 Mod. 409. 12 W. 3. The King v. Ragley Parish.

2Ld. Raym.
Rep. 858.
S. C. and
judgment
was arrested.

39. A man was indicted for *not working towards the repair of the highways according to the statute, and shewed that 6 days between such and such a time were appointed by the justices, and that the defendant did not come within any of the six days.* This indictment was held naught; for the *particular days ought to be set forth.* 1 Salk. 357. Pasch. 2 Ann. B. R. The Queen v. Kime.

40. The justices must not *appoint 6 days generally between such and such a time*, but must be particular, and if the appointment was naught in such case, the party is not bound to come at all. 1 Salk. 357. Pasch. 2 Annæ, B. R. The Queen v. Kime.

41. Indictment was for *not repairing a house standing upon the highway ruinous, and like to fall down, which the defendant occupied, and ought to repair ratione tenuræ sue.* Upon not guilty, the jury found a special verdict, viz. *that the defendant occupied, but was only tenant at will.* The court held, that the *ratione tenuræ* was only an idle allegation; for it was not only charged, but found that the defendant was *occupier*, and in that respect he is answerable to the publick; for the house was a nuisance as it stood, and the continuing it in that condition is continuing the nuisance; and as the danger is the matter that concerns the publick, the publick is to look to the occupier, and not to the estate, which is not material in such case as to the publick. And Powell J. held, that there might be such a tenure, and that tenures being chargeable upon the land by the statute of avowries, it is not material, even in an avowry, what estate the occupier has in the premises. 1 Salk. 357. Trin. 2 Ann. B. R. The Queen v. Watts.

42. The

42. The defendants were indicted for not repairing a common footway, and *confessed, and submitted to a fine*; et per cur. the matter is not at an end by the defendants being fined, but writs of *distringas* shall be awarded *in infinitum, till we are certified that the way is repaired*. Salk. 358. pl. 6. Pasch. 3 Ann. B. R. The Queen v. Cluworth Inhabitants.

6 Mod. 163. cites S. C. — But the defendants are not bound to put it in better condition than it has been

time out of mind, but as it has usually been at the best. 1 Salk. 158. in S. C.

43. An indictment was, that *such a day alta via regia fuit & adhuc est valde lutoſa & tam anguſta, ſo that the queen's people cannot paſs without danger of their lives, &c.* Holt Ch. J. and Powell J. held the indictment naught for want of ſaying, *that the way was out of repair*; and Powell ſaid, that the ſaying it was tam anguſta that people could not paſs, was repugnant to its being alta via regia; for had it been ſo narrow, people could never have paſſed there time out of mind. 2 Ld. Raym. Rep. 1169. Trin. 4 Ann. The Queen v. the Inhabitants of Stretford.

11 Mod. 56. The Queen v. the Inhabitants of Stratford, S. C. the court thought it inſufficient, becauſe not ſhewn that the way was ſtraightened.

For more of Chimin Common in general, ſee Indictment, Nuſance, and other proper titles.

Chimin Private.

[513]

(A) Chimin Private. [And how Perſons may be intituled to a Way.]

Fol. 391.

[1. A Man by preſcription may have a way from his meadow to the high-ſtreet. 20 Aff. 18.]

Br. Chimin, pl. 7. cites S. C. ſays, that a man

ſhall not have aſſiſe of nuſance of a way ſtopped, unleſs it be to ſome franktenement, but if it be from a meadow to a high ſtreet, it is as well as from his houſe to the high ſtreet. — Fitzh. Aſſiſe, pl. 218. cites S. C. & S. P. accordingly. — Br. Aſſiſe, pl. 229. cites S. C.

[2. A man may have a way from his houſe to the church. 20 Aff. 18.]

Br. Chimin, pl. 7. ſays, Herle a-

warded aſſiſe of a way which was claimed to a church; and Brooke ſays, quod nota, & quære inde; for of a way in groſe an aſſiſe does not lie. — Fitzh. Aſſiſe, pl. 218. cites S. C. & S. P. — Br. Aſſiſe, pl. 229. cites S. C. but Brooke ſays, quære inde, for it is not claimed properly to his franktenement.

3. A man may preſcribe to have a way to go out of a church, or over a church-yard, notwithstanding that it is a ſanctuary; per all Vol. IV. R 1 the

Br. Preſcription, pl. 91. cites

S. C. and says, that it seems that the words (out of a church) signifies (through the church, &c.)—

Jenk. 142. pl. 94. S. C.

the justices and apprentices in chancery. Trin. 18 E. 4. 8. a. pl. 10. And it was said there, that the church-yard of the Charter-house is a common way for the inhabitants of London to St. J. and that they prescribe in it.

4. Chimin *appendant* cannot be made in gross by grant, for none can have the commodity thereof but he who has the land to which this way is appendant. Br. Chimin, pl. 14. cites 5 H. 7. 7.

5. A. had an acre of land which was in the middle, and *incorpassed* with other of his lands, and *infeoffs* B. of that acre, and resolved by the 4 justices that B. shall have a convenient way over the lands of the feoffor, and he is not bound to use the same way that the feoffor uses. Noy, 123. Oldfield's case.

3 Salk. 173. pl. 2. 216. pl. 1. 579. pl. 1. S. C. but S. P. does not appear.

3 Salk. 121. S. C. but S. P. does not appear.

6. A stranger may have a way over another man's soil 3 manner of ways, viz. for necessity, by grant, and by prescription. 1. For necessity, as if A. has an acre of ground surrounded by ground of B.—A. for necessity has a way over a convenient part of B.'s ground to his own soil, as a necessary incident to his ground. So if A. grants a piece of land which is surrounded by land of vendor, he grants a way as a necessary incident therewith. 2. If A. be seised of Blackacre and Whiteacre, and uses a way from Blackacre over Whiteacre to a mill, river, &c. and he grants Blackacre to B. with all ways, easements, &c. the grantee shall have the same conveniency that A. had when he had Blackacre. So if A. has 2 acres, and has a way from them over B.'s land, and grants one of them with all ways, B. shall have the same way that A. had. But there in making title B. must allege such an estate in A. as is traversable, and not only say that A. was possessed of the land to which, &c. for a term of years; for there the possession would be traversable materially. 3. If a way of necessity be claimed, it is a good plea to say that the party has another way; but otherwise where a way is claimed by grant or prescription. 6 Mod. 3. Mich. 2 Ann. B. R. Staple v. Heydon.

[514]

(A. 2) A Way. How it may be used.

[1.] IF A. be seised in fee of a backside in a town, and the high street is next adjoining thereto on the east, and there is a gate in the backside which incloses it from the street, the gate being in the east next to the street; and A. is also seised in fee of a messuage and piece of land next adjoining to the backside on the north of the backside, and by deed infeoffs B. of the messuage and piece of land which are on the north of the backside, and by the same deed further grants to him and his heirs *liberos ingressum, egressum, & regressum in, ad & extra eadem concessa premissa, in, per & trans predictas januam & backside*; by force of this grant B. may go from the street through the gate, and over the backside to the messuage or piece of land of which he is infeoffed; but he cannot go through the said gate and backside

backside to other places, or from other places to the street, without coming to the said messuage or piece of land, for the liberty is granted to him of ingress and egress in, *ad & extra eadem concessa premissa*, so that this is made *appurtenant to the premises before granted*.

Car. B. between HODDER AND HOLMAN, adjudged upon a demurrer, where in trespass pedibus ambulando in the backside, the defendant justified by force of the said grant, shewing all this matter in the grant, and that he went from the said piece of land over the backside and through the gate to the street, & sic retrorsum; and the plaintiff replied, that he did the trespass of his own wrong, absque hoc that he went from the said piece of land over the backside through the gate to the street, & sic retrorsum; and adjudged a good traverse, for the cause aforesaid. Intratur Hill. 9 Car. Rotulo. Dorset.]

[2. In trespass for breaking his close, if the defendant justifies going over his close, because he was *used, time out of mind, to have a way over it from D. to Blackacre*, and the plaintiff replies that at the time of the trespass the defendant went with his carriages from D. to Blackacre, & thence to a mill, this will not maintain his action; for when the defendant was at Blackacre, he might go whither he would. Pasch. 16 Jac. B. R. between SANDERS AND MOSE, adjudged upon demurrer.]

[3. But it seems, that if a man hath a way for carriage from D. to Blackacre over my close, and after he purchases land adjoining to Blackacre, he cannot use the said way with carriages to the land adjoining, though he comes first to Blackacre, and thence to the land adjoining; for then it may be very prejudicial to my close; but it seems, if I will help myself, I must shew the special matter, and that he used it for the land adjoining; vide the said case of P. 16 Jac. Banco.]

and that a prescription presupposed a grant, and ought to be construed according to the intent of its original creation, and to this the whole court agreed, and judgment for the plaintiff. Mod. 190. pl. 22. Mich. 26 Car. 2. C. B. Howell v. King.——S. P. resolved accordingly, per tot. cur. and judgment was pronounced accordingly, though it is not entered on the roll. Lutw. 112. 114. Trin. 7 W. 3. Laughton v. Ward.——Ld. Raym. Rep. 75. Pasch. 8 W. 3. S. C. adjudged accordingly, per tot. cur. and Powell J. junior said, that the difference is, where he goes farther to a mill, or a bridge, there it may be good, but when he goes to his own close it is not good; for, by the same reason, if he purchases 1000 closes he may go to them all.

S. P. and same objection made, but it was answered, that by this means the defendant might purchase 1000 or 10000 acres adjoining to Blackacre, to which he prescribes to have a way, by which means the plaintiff would lose the benefit of his land,

* [515]

4. If a man lets a house, reserving a way through it to a back-house, he cannot come through the house without request, and that too at seasonable times. Vent. 48. Mich. 21 Car. 2. B. R. in case of Tomlin v. Fuller.

Mod. 27. pl. 71. in S. C. that lessee is not bound to leave his

doors open for the lessor's coming in at 1 or 2 o'clock in the night, but he must keep good hours.



{ Fol. 392. } (B) To whom the *Soil* and the Things thereupon
do belong.

* Br. Chimin, pl. 10. [1.] N an *highway* the king hath nothing but the *passage* for himself
cites S. C. and his people. * 8 E. 4. 9. + 2 E. 4. 9.]
by all the justices. — Fitzh. Chimin, pl. 1. cites S. C. — Br. Chimin, pl. 9. cites S. C.
— Fitzh. Trespass, pl. 95. cites S. C.

† Br. Chimin, pl. 10. [2. But the *freehold* and all the *profits*, as trees, &c. belong to the
cites S. C. lord of the soil. † 8 E. 4. 9. § 2 E. 4. 9. || 8 H. 7. 5. b.]
Fitzh. Chimin, pl. 1. cites S. C. § Br. Chimin, pl. 9. cites S. C. by all the
justices except Moyle. — Fitzh. Trespass, pl. 95. cites S. C. || He who has the
trees in the highway, there the frank-tenement is to him; per Keble, for if he has land adjoining, the
frank-tenement of the way is to him. Br. Chimin, pl. 15. cites 8 H. 7. 5.

Fitzh. Chimin, pl. 1. [3. The lord of the soil shall have an *action* for digging the
cites S. C. ground. 8 E. 4. 9.]
& S. P.

Br. Leet, [4. If *trees* grow in the highway, he to whom the seignory of
pl. 3. cites the leet of the same place doth belong, shall have the trees. 27 H.
S. C. but 6. 8. per curiam.]
Brooke makes a
quære how this word (seignory of the leet) is to be taken; for it seems that it is the seignory of the
fee, viz. the seignory of the soil; for leet is not seignory; because if it be not so taken, it cannot be
law; but leet in some country is taken for the soil.

See tit. [5. Generally the owner of the soil of both sides the way shall have
Trees (B) the trees growing upon the way. 18 Eliz. B. R. per curiam,
per totam. cited P. 11 Jac. B. R.]

[6. The lord of the rape, within which there are 10 hundreds,
may prescribe to have all the trees growing within any highway
within this rape, though the manor or soil adjoining be to another;
for usage to take the trees is a good badge of ownership. P.
11 Jac. B. R. BETWEEN SIR THOMAS PELHAM plaintiff, and
WIATT AND BLACK defendants, per curiam.]

7. The soil and frank-tenement of the way, is to those whom it ad-
joins. Br. Nufans, pl. 28. cites 8 H. 7. 5. per Keble.

[516] (C) Interruption. What is. And Remedy for
the same.

1. IF one grants me a way, and afterwards interrupts me in it, I
may resist him; Arg. Godb. 53. pl. 65. cites 32 E. 3.

S. P. but 2. If a man disturbs me in my way with weapons, trespassi vi &
contra armis lies. Br. Action sur le Case, pl. 29. cites 2 H. 4. 11. per
where he has the land Skrene and Thirning.
where, &c.
Br. Trespass, pl. 72. cites S. C.

3. For *stopping* a way to his freehold, either *case* or *assise* lies. So where the way was *totaliter stoppt*, so that he could not
Cro. E. 466. (bis) pl. 22. Pasch. 38 Eliz. B. R. Alston v. Pamphyn.

get to his common. Cro. E. 845. pl. 32. Trin. 43 Eliz. in Cam. Seacc. Cantrel v. Church. —
Noy, 37. Cautwell v. Church, S. C. and judgment affirmed for the plaintiff.

4. He that has *ingress into a house*, ought to have it at the *usual door*; and if they leave such door open, but *dig a ditch* that he cannot enter without leaping, it is a breach; per Doderidge.
Lat. 47. Trin. 2 Car. Climson v. Pool.

5. A. has a way over my land, and coming to pass over it I take him by the sleeve and say, *come not there, for if you do I will pull you by the ears*; it is a breach of condition. The same it is if *I lock my gates*. Lat. 47, 48. Trin. 2 Car. per Doderidge in the case of Climson v. Pool.

6. If I have a way without a gate, and a *gate is hung up*, action Or I may cut it down.
on the case lies; for I have not my way as I had before; per cur. Jo. 221.
Litt. R. 267. Pasch. 5 Car. C. B. in case of Paston v. Utbert. pl. 1. Pasch.
James v. Haywood. — Cro. C. 184, 185. pl. 3. S. C. and S. P. by Hyde, Jones, and Whitlock. 6 Car. B. R.

7. Cognizance of ways to *carry tithes* belongs to court christian, as appears by stat. 2 & 3 E. 6. 13. F. N. B. Consultation, 51. (A) and Linwood in his *Treatise of Tythes*; and therefore a consultation was awarded. Jo. 230. pl. 1. Hill. 6 Car. B. R. Halsey v. Halsey.

8. A man has a messuage, and a *way to the messuage through another's freehold*, and the *way is stopped*, and then the *house is aliened*. The alienee can bring no action for this nuisance before request. Mod. 27.
Vent. 48. Mich. 21 Car. B. R. Tomlin v. Fuller. pl. 71. S. C. the action was for stopping a passage so that the plaintiff was hindered from cleansing his gutter. It was moved in arrest, that there was no request; but it was answered that the wrong began in the defendant's own time, whereas had the nuisance been done by a stranger, notice must have been given before the action brought. Twisden held it was not good at the common law, and that defendant might have demurred; but the court held it aided by the verdict; and judgment for the plaintiff.

9. Upon evidence given in an action of trespass between W. & C. at the bar, it was said by Glyn Ch. J. that if one make a ditch, or *raise up a bank to hinder my way to my common*, I may *justify the throwing it down, and the filling it up*. Sty. 470. Mich. 1655. Williamson v. Coleman.

10. Every man of common right may *justify the going of his servants or of his horses upon the banks of navigable rivers, for towing barges, &c.* to whomsoever the right of the soil belongs; and if the water of the river impairs and decreases the banks, &c. then they shall have reasonable way for that purpose in the nearest part of the field next adjoining to the river; and he compared it to the case where there is a *way through a great open field, which way becomes foundrous*, the travellers may justify the going over the outlets of the land, not inclosed, next adjoining. Ruled at nisi prius at Westminster, the first sitting after Michaelmas-term, 10 W. 3. Id. Raym. Rep. 725. Young v. . . .

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(D) Made unpassable, &c. Remedy. And of setting out new Ways.

1. IF one grants me a way, and after *digs trenches* in it to my hindrance, I may *fill them up* again. Arg. Godb. 53. pl. 65. cites 32 E. 3.

2. If a way, which a man has, becomes not passable, or becomes very bad by the owner of the land tearing it up with his carts, and so the same be filled with water, yet he which has the way cannot *dig the ground to let out the water*; for he has no interest in the soil. Godb. 52. pl. 65. Mich. 28 & 29 Eliz. B. R. Dike v. Dunston.

Yelt. 141.

S. C. —

Noy 128,

cites S. C.

as adjudged

accordingly;

and S. P. was

there ad-

judged in the

case of

Horne v. Taylor

accordingly,

and likewise

held that the

defendant may

well justify

going in the

place where

the ancient way

was, and is not

bound to go in

the way that is

unplowed.

Where a way is

stopped, and

another way

made in another

place, the way

which is stopped

cannot be said

to be diverted.

And. 234. pl.

251. Pasch. 32

Eliz. in case of

Aithburnham v.

Cornwallis.

The assigning the

new way will

not justify the

stopping the old

way. Carth. 393.

Trin. 3 W. & M.

in B. R. per cur.

obiter. — Cro.

C. 266. pl. 16.

Mich. 8 Car.

B. R. the S. P.

in case of the

King v. Ward &

Lyme.

3. In trespass, &c. the defendant prescribed for a foot-way, and that the plaintiff such a day plowed it up, and sowed it with corn, and laid thorns on the sides, and that before the trespass done he left a new foot-way near the old way, which had since been used by all foot-passengers, and that the defendant went in the said new way to such a place, &c. *qua est eadem transgressio*; and adjudged a good justification. Brownl. 212. Mich. 6 Jac. Horn v. Widelake.

Horne v. Taylor accordingly, and likewise held that the defendant may well justify going in the place where the ancient way was, and is not bound to go in the way that is unplowed.

Where a way is stopped, and another way made in another place, the way which is stopped cannot be said to be diverted. And. 234. pl. 251. Pasch. 32 Eliz. in case of Aithburnham v. Cornwallis. — The assigning the new way will not justify the stopping the old way. Carth. 393. Trin. 3 W. & M. in B. R. per cur. obiter. — Cro. C. 266. pl. 16. Mich. 8 Car. B. R. the S. P. in case of the King v. Ward & Lyme.

2 Lev. 234.

After v.

Finch, S. C.

but D. P.

pl. 19.

Mich. 30

Car. 2.

Abfox v. French

* He may

go in a way

good and passable

as near the path

as he can. Noy,

attorney-general,

said it was so

resolved.

Jo. 297. in

lin. Windsor

in Henna's

case.

2 Lev. 234.

After v.

Finch, S. C.

but D. P.

pl. 19.

Mich. 30

Car. 2.

Abfox v. French

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as he can. Noy,

attorney-general,

said it was so

resolved.

Jo. 297. in

lin. Windsor

in Henna's

case.

4. If a highway be so bad as it is * *not passable*, I may then justify going over another man's close next adjoining. 2 Show. 28. but D. P. pl. 19. Mich. 30 Car. 2. Abfox v. French

* He may

go in a way

good and passable

as near the path

as he can. Noy,

attorney-general,

said it was so

resolved.

Jo. 297. in

lin. Windsor

in Henna's

case.

2 Lev. 234.

After v.

Finch, S. C.

but D. P.

pl. 19.

Mich. 30

Car. 2.

Abfox v. French

* He may

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resolved.

Jo. 297. in

lin. Windsor

in Henna's

case.

(E) Extinguished by Unity.

Godb. 4. pl.

5. cites 21

E. 3. 2.

S. P.

1. A Way extinguished by *unity of possession*, is revivable after on descent to 2 daughters, where the land over which is allotted to one, and the other land, in which the way was, is allotted to the other sister; and this allotment without specialty to have the land anciently used, is good to revive it. Jenk. 20. pl. 37. cites 21 E. 3.

2. In trespass the defendant justified for a way *appurtenant* to his house in D. by prescription, to go to 8 acres of wood in C. The plaintiff said that J. N. after time of memory, that is to say, in the time of king R. was *seised of the land where* the defendant claimed the way, and of the wood to which he claimed it. *Quære*, if unity of possession in the land in which he claims, and in the wood to which he claims it, shall be an extinguishment, as unity of possession

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fession of land in which, &c. and of the house to which, &c. shall be? Brooke says, it seems that it shall clearly. Br. Chimin, pl. 13. cites. 3 H. 6. 31.

3. A. had a *close* and a *wood* adjoining to it, and time out of mind a way had been used over the close to the wood, to carry and re-carry. He granted the close to B. and the wood to C. The grantee of the wood shall not have the way; for A. by the grant of the close, had excluded himself of the way, because it was not saved to him. Cro. E. 300. pl. 13. Pasch. 34 Eliz. B. R. Dell v. Babthorp.

4. In an action of trespass the case was thus: A. had a *cross-way* by prescription to go to Wh. Acre over Bl. Acre, and after he purchases Bl. Acre, and of that incloses J. S. and adjudged that the cross-way is extinct, because by the unity the prescription fails. Noy, 119. Mich. 3 Jac. C. B. Heigate v. Williams.

5. A way of ease shall be extinguished by unity of possession, but not a way of necessity; per Doderidge: Lat. 154. Hill. 1 Car.

Palm. 446.
S. P. by
Doderidge.

(F) Pass. By what Words or Conveyance.

1. A Way is an easement only, and will not pass by the words *omnia tenementa & hereditamenta sua*. Br. Lect. Stat. Limit. 42.

2. When land is granted with a way thereto, it is quasi appendant unto it, and a thing of necessity; and therefore by a lease of the land, though the way be not mentioned, it well passes without being expressed in the deed; for the land cannot be used without a way, and therefore it shall ensue it, and pass of necessity, and unity of possession does not extinguish it; per tot. cur. Cro. J. 190. pl. 13. Mich. 5 Jac. B. R. in case of Beaudley v. Brook.

3. A. seised of Bl. Acre and Wh. Acre in fee, by indenture of bargain and sale inrolled, conveyed Bl. Acre to J. S. in fee, with a way over Wh. Acre. This is not good; for here is no grant of the way in the deed, but only a bargain and sale of Bl. Acre, and a way over Wh. Acre; for nothing but the use passed by the deed, and there cannot be a use of a thing not in esse, as a way, common, &c. which are newly created, and until they be created no use can arise by bargain and sale, and so nothing passed by the deed. Cro. J. 189. pl. 13. Mich. 5 Jac. B. R. Beaudly v. Brook.

(G) Actions.

1. AN assise does not lie of a way; for it is not profit appender nor franktenement, but an easement. Thel. Dig. 68. lib. 8. cap. 6. f. 2. cites 34 Aff. 13. Trin. 31 E. 1. Assise, 440.

2. Scire facias was maintained of a way out of a fine levied, in permittat. Thel. Dig. 68. lib. 8. cap. 6. f. 2. cites Hill. 2 E. 3. * 46,

* There are
not so many
foi. in that
year.

3. A way was extinct, and yet a new one was reserved upon partition of a mill, and land over which the way went, and the assise of nuisance awarded to lie. Quære, if this was inasmuch as the way is appendant to the mill by the reservation, or because it is assise of nuisance; for it seems, that assise of novel disseisin does not lie of a way, but quod permittat; and of a way in gross assise of nuisance does not lie. Contra of a way appendant to franktenement. Br. Chimin, pl. 5. cites 21 E. 3. 2. but says, that this case is better abridged, tit. Nuisance, in Fitzh. 2. with a good diversity where the assise lieth, and where not.

4. Quod permittat of a way; Finch said for law, that a man shall not have quod permittat of a way, unless he claims it to some franktenement, or from some franktenement to the high street, or to the church, and ruled over; Belk. precise in this case. Quod nota. Br. Chimin, pl. 3. cites 45 E. 3. 8.

5. If a man stops the king's highway, so that I cannot go to my house, or to my close, I shall not have action upon the case; for the stopping of a common highway royal shall be punished by the leet, and every man grieved shall not have action thereof; per Baldwin Ch. J. Contra Fitzherbert J. and that where one has greater damage than another he shall have action upon the case. Br. Action sur le Case, pl. 6. cites 27 H. 8. 26, 27.

6. So where a man makes a ditch over the highway, and I and my horse fall therein in the night, I shall have action upon the case; per Fitzherbert J. Br. Action sur le Case, pl. 6. cites 27 H. 8. 26, 27.

S. C. cited per Gould J. as a strong case for his opinion for the plaintiff, in the case of Iveson v. Moor. Ld. Raym. Rep. 491. Trin. 11 W. 3.— Ibid. 492. S. C. cited by Rokeby J. who was of opinion for the defendant, and said, that admitting

7. The plaintiff declared, that he had the tithes of the parish of B. for a year, and was possessed of a barn, in which he intended to lay them, and that the king's highway in B. was the direct way for carrying the tithes to the barn, but that the defendant had obstructed it with a ditch, and with a gate erected across the way, so that he could not carry the tithes by the said way, but was forced to carry them round about, and in a more difficult way. After verdict it was objected, that this being alleged to be a stoppage in the highway, was a common nuisance, and no damages shall be given in such a case, for then every one who had occasion to pass that way might bring the like action, which the law will not suffer by reason of the multiplicity. Sed per curiam, the plaintiff had particular damage by the labour of his servants and cattle, occasioned by obstructing the passage in the right way, which may be of greater value than the loss of a horse, and such like damage which is allowed to maintain an action. 2 Jo. 157. Trin. 33 Car. 2. B. R. Hart v. Basset.

this case to be law, yet there is some special damage laid. — And ibid. 494. S. C. cited by Holt Ch. J. who held for the defendant, and said he had no need to deny the case of Hart v. Basset, because the plaintiff declared that he was farmer of the tithes, and that the way was near to the plaintiff's land, and convenient for the carrying away the tithes to his barn, and that the defendant had stopped the way, by which the plaintiff was compelled to go round about, &c. And that if it was as Mr. Justice Gould cited it, that he was driven to a greater expence, that makes it better than it is in the report of 2 Jo. 156. Besides, Holt said, that there was another ingredient, viz. that he was liable to an action if he permitted the tithes to lie on the ground beyond a convenient time, and that all this matter was shewn specially; but that if there was no more than the plaintiff's going round about, it is a hard case.

(H) Pleadings.

1. **W**AY ought to be claimed *certainly, to go or to carry, and recarry, &c. et quibus temporibus, and to what franktenement it is appendant.* Br. Chimin, pl. 7. cites 20 Aff. 18.

2. He who justifies to go in a highway ought to shew that it is *the highway of the king, and has been time out of mind, &c.* and the plaintiff may say, *that men have gone this way sometimes by licence of the plaintiff, and sometimes for their money, &c.* absque hoc that it has been the highway of the king time out of mind, &c. Br. Chimin, pl. 7. cites 20 Aff. 18.

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3. *Quod permittat habere cheminum ultra terram* was brought by the tenant against the tenant of the soil, who demanded the view. Belknap said, the view you ought not to have; for you yourselves are tenants of the soil where I have the way. Per Finchden, you shall not have the way, unless you claim it *to some franktenement, or from your franktenement to the high street, or to the church, or otherwise* the writ is not good, clearly; quod nota. Br. View, pl. 21. cites 45 E. 3. 8.

The Year-book is, that the writ was to have a way over the land of the tenant, against him who was tenant of the soil, &c.

4. *Trespass* upon the case was brought by 3 against 2, who counted that the plaintiffs were seised of 14 acres of land in B. and of 3 acres of meadow there, and that the plaintiffs and those whose estate they have, &c. have had, and ought to have a way over 3 acres of the defendant's to the said meadow, there have the defendants disturbed them to the damage of 40s. and the defendants took the trespass severally, and traversed the prescription, and so to issue; and found for the plaintiff to the damage of a mark. Thirwit pleaded in arrest of judgment, that the trespass of the one is not the trespass of the other, where the defendants took the trespasses severally, and the damages are assessed intire where they ought to be severd. Per Thirn. this is not much to the purpose. Br. Action sur le Case, pl. 29. cites 2 H. 4. 11.

5. In trespass upon the case, the defendant prescribed in a way over the bridge of D. to his manor of B. to carry victuals and other necessities over the bridge, and did not say to what place he should carry, and yet well; by Hank. And so see that he prescribed in a foot-way and horse-way, that is to say, to pass and carry. Br. Chimin, pl. 16. cites 11 H. 4. 82.

S. C. cited 2 Roll. Rep. 134. Mich. 17 Jac. B. R. where the prescription was, that all those whose estate

he has in such a house had a way per & trans the pound-garden, but did not say from the house to such a place, nor to such a house; exception was taken; because it was not said, from the place to such a house; sed non allocatur; for Dodridge J. said, that it is not material whether he had the way from or to the house or not, and to prove this cites 28 H. 6. 9. and 11 H. 4. 32.

6. The defendant justified in trespass, that he and his ancestors, tenants of such a house, and 30 acres of land in D. have had a way over the place where, &c. to the market, and to the church of D. time out of mind, by which he used the way, &c. and the other said, that *de son tort demesne, absque hoc* that he and his ancestors have had such way time out of mind in the manner as the defendant supposed, and so

Br. Chimin, pl. 2. cites S. C. Brooke says quære; for no exception is thereof taken. —

to

Br. De son
Tort, &c.
pl. 1. cites
28 H. 6. 9.

Br. Plead-
ings, pl.
252. cites
S. C.

to issue, and by the reporter it is a negative pregnant; for it may be found that he had a way to the market, and not to the church, or e contra; quære. Br. Negativa, &c. pl. 4. cites 28 H. 6. 9.

7. In a quod permittat the plaintiff made his title to the way in his count by coercion of the court, whereupon he *prescribed and claimed from such a place to such a place*, as he ought, and shewed by reason of what land, and for what he used the way, as to carry and re-carry, &c. which see in the book there at large, and shewed that he was seised of fee and of right, and alleged esplees. Br. Chimin, pl. 12. cites 30 H. 6. 7, 8.

8. In action upon the case, the writ was *quod cum ipse habeat quoddam chiminum ratione tenuræ, &c.* and the defendant *levavit murum, per quem the plaintiff chiminum habere non potest, &c.* and held per Prisot, that the writ is not good, for the repugnancy. Thel. Dig. 104. lib. 10. cap. 11. f. 26. cites Trin. 33 H. 6. 26.

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9. In trespass, where a man *justifies* for a way, the defendant ought to shew, that he has a way from such a place to such a place, and not to say generally that he has a way over such land with his beasts to carry and re-carry time out of mind; as to say from his house; or such a close, over the land of the plaintiff to such a close or land, or to the church, market, or highway in such a place, or the like; quod nota, per. cur. And per tot. cur. he need not to shew the quantity of the close of the plaintiff in which he claims the way; otherwise it is elsewhere where he intitles himself to the soil, as his franktenement, lease for years, or the like; but he shall shew the quantity of the way which he claims, viz, of so many feet, or the like; quod nota bene; by which the defendant took longer time thereof. Br. Chimin, pl. 6. cites 39 H. 6. 6.

4 Le. 167,
168. pl. 273.
in time of
queen Eliz.
S. C. in to-
tidem verbis.
— Ibid.
224. pl. 360.
Mich. 10
Eliz. C. B.
Anon. S. C.
in totidem verbis.

10. In case the plaintiff *prescribed habere viam tam pedestrem quam equestrem pro omnibus & omnimodis carriagiis*, Leonard prothonotary said, that by such prescription he could not have a cart-way; for every prescription is stricti juris; and Dyer said, that it is well observed, and he conceived the law to be so, and therefore it is good to prescribe habere viam pro omnibus carriagiis generally without speaking of horse-way, or cart-way, or other way, &c.

3 Le. 13. pl. 31. 8 Eliz. C. B. Anon.

Noy, 9.
Banning's
case, S. C.

11. In case for *stopping his way*, the plaintiff declares that he and all those, &c. have had a way from his house in D. over Green-Acre in S. and over Black-Acre to such a place in P. and that the defendant had stopped his way in S. and upon not guilty found for the plaintiff it was moved in arrest, because he did not allege in what vill Black-Acre was, for he ought to allege all the lands through which he was to have his way, and vills where they lie; and by Gawdy, this is a fault for which the defendant might have demurred, but that not being done it was adjudged for the plaintiff. Cro. E. 427. pl. 27. Mich. 37 & 38 Eliz. B. R. Brag v. Banning.

12. Per curiam, the plaintiff in his declaration shall never lay that the way is *appendant or appurtenant*, because it is only an *easement*.

ment and not an interest; and all the precedents in the Book of Entries are accordingly, and that though the jury found it to be appurtenant to the messuage. And Man, secondary, informed the judges that a judgment in B. R. was reversed in the exchequer, because the plaintiff had alleged a way appurtenant to the house, and so claimed it in other manner and nature than he ought to do by law; and adjudged in the principal case for the plaintiff. Yelv. 159. Mich. 7 Jac. B. R. Godley v. Frith.

13. In trespass the defendant *prescribed for a passage over the land where, &c.* but it was held not good, and adjudged for the plaintiff; for *passagium* is properly a passage over the water, and not over land, and the defendant ought to have prescribed in the way, and not in the passage. Yelv. 163. Mich. 7 Jac. B. R. Alban v. Brownfall.

Brownl. 215, 216. S. C. & S. P. but seems only a translation of Yelv.—S. C. cited Arg. 2 Lutw. 1518.

14. In prescribing for a way, the defendant ought to shew a *quo loco ad quem locum* the way is, and though a way may be in gross, yet it ought to be bounded and circumscribed to a certain place, especially when it appears to lie in usage time out of mind; for this ought to be in *certo loco*, and not in one place to-day, and another place to-morrow, but constantly and perpetually in the same place; adjudged. Yelv. 163, 164. Mich. 7 Jac. B. R. Alban v. Brownfall.

Brownl. 215, 216. S. C. & S. P. but is only a translation of Yelv.—Admitted per cur. that a way must be pleaded a *quo termino*

ad quem, because a man must not go over my grounds but to the right place. * Hob. 190. pl. 234. Trin. 15 Jac. in Gogle's case.—Hutt. 10. Cobb. v. Allen, S. C. and held that though the proper use of a way is to some end, and that ought to be shewn, yet if it be only that he had a way over the closes in the new assignment, and no place or end thereof is pleaded from what close, or to what other place; and issue is taken upon the prescription, and found the prescription is good.—But in an indictment for an encroachment on the king's highway, that objection, that it was not laid a *quo* or *ad quem* the way leads, was disallowed. 2 Keb. 715. pl. 99. Mich. 22 Car. 2. B. R. The King v. Rawlins.—Ibid. 728. pl. 8. Hill. 22 & 23 Car. 2. B. R. The King v. the Inhabitants of Glaston, the court conceived the terminus a *quo* not material.

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15. In trespass the defendant *prescribed for a way*, but did not shew what manner of way it was, whether a foot-way, or horse-way, or cart-way, and so uncertain; and therefore the bar adjudged ill. Yelv. 163, 164. Mich. 7 Jac. B. R. Alban v. Brownfall,

Brownl. 215, 216. S. C. & S. P. but is only a translation of Yelv.—In case for

stopping a way, the plaintiff declared that he was seized of 18 messuages in St. Botolph's, Aldgate, and prescribed for a way from every one of those messuages over a certain vacant piece of ground, &c. to such place; and after a verdict for the plaintiff, it was objected that it was not shewn what sort of a way he had, whether a foot-way, horse-way, or cart-way; sed non allocatur; for it is said that he had a way *in & rediva*, &c. and after a verdict it shall be interdicted a general way for all purposes. Comyns's Rep. 114. pl. 76. Pasch. 13 W. 3. B. R. Warner v. Green.—12 Mod. 580. S. C. but S. P. does not appear.—Ld. Raym. Rep. 701. S. C. but S. P. does not appear.

16. In a declaration in case for stopping the plaintiff's way, it was not shewn to what village the way led. After verdict for the plaintiff, this was moved in arrest of judgment, and held a good exception, and judgment arrested; but if it had been unto a common way there or in such a village, it had been good. Brownl. 6. Trin. 8 Jac. Allyns v. Sparks.

17. In

17. In *trespass*, the plaintiff declared of a way *from his house to a mill, and so back again*. Exception was taken that every way is either appendant or in gross, and ought to be so laid, but that here the plaintiff had *not alleged that this way was appertaining to his house*, and the court were clear of that opinion; because in this action the plaintiff is only to recover damages, whereas in *assise of nuisance* the thing itself is to be recovered. But in this principal case he ought not to allege that this way was appendant to the house, it being laid to be from the house to the mill, and from the mill back again to the house; and so the declaration is good, and judgment for the plaintiff. Bull. 47. Mich. 8 Jac. Pollard v. Cary.

18. In *sci. fa.* upon a recognizance for the *good behaviour*; for that the defendant with others, riotously and unlawfully entered into such a close, and cut up a quick-set hedge, &c. The defendant as to all but the entering the close and cutting the hedge, pleaded not guilty; and as to that he justified by a prescription for a highway in the said close, and because it was stopped with a quick-set hedge, he cut it up; the plaintiff replied *de injuria sua propria & ex malitia præcogitata*, the defendant with others cut the hedge, &c. upon which issue was joined, and found for the plaintiff. It was objected, that there was not any issue joined, for *de injuria sua propria*, where one justifies for a way, or for any particular thing, is no issue, but the plaintiff ought particularly to traverse the prescription alleged, and conclude *absque tali causa*, because the whole case is in issue; and so it was adjudged. Cro. J. 598. pl. 22. Mich. 18 Jac. B. R. The King v. Hopper.

Palm. 38.
S. C. and
according to
the alterations.

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19. If a man has a way from his house to the church, and the next close of land to his house is his own; it was said by Doderidge J. that he cannot in this case prescribe that he has a way from his house to the church; for he cannot prescribe to have a way in his own land. But Ley Ch. J. contra, because then all ways in the corn [common] fields shall be distant [destroyed] but the prescription though general, shall be applied to the other lands, to which Chamberlain J. agreed. But Doderidge said that infruteness [infiniteness] alters the case. 2 Roll. Rep. 397, 398. Mich. 21 Jac. B. R. in case of Slowman v. West.

20. In action on the case for disturbing the plaintiff in his way. Exception was taken because it was *not shewn from what vill to what vill the way led*; and per Jones and Doderidge J. there is a difference when it is alleged as an abuttal and when by way of justification in trespass; and judgment accordingly for the plaintiff, Palm. 420, 421. Pasch. 1 Car. B. R. Harrison v. Rook.

1. st. 160.
Hill. 2 Car.
Parker v.
Newtham,
S. C. in to-
tidem verbis.

21. Case was brought for stopping a way which the plaintiff had from such a place over Black-Acre where the nuisance is, unto such a field (by name), and it was ruled to be good, without shewing what interest he had in that field; for it shall be intended to be a common field. But if it had been *usque ad tale clausum*, he ought to shew what interest he hath in the close. Noy, 86. Park v. Stewlam.

22. In trespass quare clausum fregit, the defendant justified for a way; the plaintiff replied, that he went out of the way; this is a good replication, per Harvey and Hutton J. to which Richardson and

and Crook agreed; for there it was confessed and avoided by the replication. Het. 28, 29. Trin. 3 Car. C. B. in case of Johnson v. Morris.

23. In trespass, &c. the defendant justified that he had a way not only to go, ride, and drive his beasts, but likewise to carry with his carts; the plaintiff traversed, *abique hoc* that the defendant had a way, not only to go and ride, &c. in the very words of the plea, and so to issue, and found for the plaintiff. It was objected that the issue was ill, because it was no direct affirmation, but by an inducement only; but the whole court held e contra. Mar. 55. pl. 83. Mich. 15 Car. Hicks v. Webb.

24. In case for stopping a way, the plaintiff set forth a title as lessee of the company of haberdashers in London, and claimed a way for them; whereas they having let the same cannot have the way, and so the prescription is not rightly applied; it should have been for them to have the way *pro tenentibus & occupatoribus suis*; but as the declaration is laid, the company ought to have brought the action. Sty. 300. Mich. 1651. B. R. Cantrell v. Stephens.

26. In trespass the defendant justified for a way from his house through the place *vobere usque altam viam regiam in parochia D. vocat' London-road*. Issue was joined upon the way, and found for the plaintiff; and per cur. it being found that he had a way over the place where, it is not material to the justification whether it leads, it being after verdict, when the right of the case is tried; and it is added at last [aided at least] by the statute of Oxford 16 Car. and so Twisden said was the opinion of all the judges in Serjeant's-inn, he putting the case to them at dinner. Vent. 13, 14. Pasch. 21 Car. 2. B. R. Clarke v. Cheyney.

27. Trespass, *quare clausum fregit & diversa onera equina* of gravel had carried away, *per quod viam suam amisit*. After verdict it was moved that the *diversa onera equina* was uncertain, and had set forth no title to the way, nor any certainty of it. It was said on the other side, that the uncertainty was aided by the verdict, and the other matter about the way was only laid in aggravation of damages. But the court held the exceptions material, and thought it would be very inconvenient to permit such a form of putting a title to a way into a declaration in trespass. 2 Vent. 73. Mich. 1 W. & M. in C. B. Blake v. Clattie.

28. In case the plaintiff declared that he, for 4 years last past, was seised in fee of lands adjoining to the defendant's meadow called B. and that during that time *habere debuit* a certain way through a gate of the defendant's in B. to a close, &c. of the plaintiff's; but the defendant, to hinder the plaintiff of the way, locked up the gate, &c. After judgment for the plaintiff by default, and a writ of enquiry, &c. it was * moved that the plaintiff had not shewn any title by prescription or otherwise; but the whole court held it only matter of form, and well upon judgment by default and a general demurrer, without any special cause shewn; and some of them held it good in all cases, though it had been shewn for cause of demurrer. 3 Lev. 266. Pasch. 2 W. & M. in C. B. Windford v. Woolaston.

stopped it, &c. The defendant pleaded a frivolous plea; and upon demurrer it was objected that the

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So where the plaintiff declared that he was possessed, &c. of an ancient messuage, and had a foot-way over the defendant's ground, as belonging to the said messuage, & de jure habet, and that the defendant

declaration was ill, because the plaintiff did not prescribe, or otherwise intitle himself to this way then by a bare possession of the messuage. The court held the declaration sufficient, it being but a possessory action. 2 Vent. 186. Trin. 2 W. & M. in C. B. Warren v. Sainthill. — 8. C. cited Arg. 6 Mod. 312. and that it was held it would be good on a demurrer.

28. Case for *disturbing the plaintiff in his way*, setting forth that 10 Maii, &c. & diu antea & adhuc, &c. he was possessed of an ancient messuage called C. and that he ought to have a way from thence in, by, and through a close of the defendant's called G. to the highway, and that the defendant had made a hedge cross his said close, so that the plaintiff could not pass. Upon a demurrer to this declaration it was objected that the plaintiff had set forth he was possessed of the messuage, but did not say that he was possessed for years; and that it appears by the declaration that the lands in which the way is claimed are the lands of the defendant, and therefore the plaintiff ought to set forth his title to the way either by grant or prescription; though otherwise it had been if the action had been brought against a meer tort-feasor, according to ST. JOHN AND MOODY'S CASE, 3 Keb. 528. 531. but notwithstanding the plaintiff had judgment. Lutw. 119, 120. Hill. 4 & 5 W. & M. Blockley v. Slater.

29. Defendant having made his prescription for a way to Bl. Acre, cannot justify going over the plaintiff's close called Wh. Acre. Lutw. 114. Trin. 7 W. 3. Laughton v. Ward.

30. A man cannot claim a way over my ground from one part thereof to another; but from one part of his own ground to another, he may claim a way over my ground. 6 Mod. 3. Mich. 2 Ann. B. R. Staple v. Heydon.

1 Salk. 173.
pl. 2. 216.
pl. 1. 579.
pl. 1. S. C.
but S. P.
does not ap-
pear. —

3 Salk. 121. S. C. but S. P. does not appear.

31. The way of pleading by a particular tenant, is to shew that such a one was seised in fee of the place to which, &c. and being so seised, was intitled to a way, and shew how, and that he granted to lessor, &c. who also granted to him, &c. For when one shews a particular estate, he must shew the fee in somebody.

3 Salk. 121. 6 Mod. 4. Mich. 2 Ann. B. R. Staple v. Heydon.
S. C. but
S. P. does not appear.

For more of Chimn Private in general, see Actions (N. b) Distraint, Trespass, and other proper titles.

Church-wardens.

(A) Church-wardens. [Their Capacity.]

Fol. 393.

[1. **T**HE church-wardens cannot *prescribe to have lands* to them and their successors; for they *are not any corporation* to have lands; *but for goods* for the church. Pasch. 37 Eliz. B. between LANGLEY AND MEREDINE.]

In London the parson and church-wardens are a corporation to purchase

lands, and demise their lands. Cro. J. 532. pl. 15. Pasch. 17 Jac. B. R. obiter.——In London the church-wardens are a corporation, and may take land for the benefit of the church. So throughout England they are a corporation, and capable to take and purchase goods for the benefit of the church; per tot. cur. (absente Crooke) Mar. 67. pl. 104. Mich. 15 Car. Anon.——They are a corporation by custom, and this is by the common law. Jo. 439. pl. 4. Trin. 15 Car. B. R. per cur. in Evelin's case.——Cro. C. 552. pl. 4. S. P. in S. C.——Noy, 139. Mich. 4 Jac. Anon. S. P.——A remainder of a term for 40 years was limited by devise to church-wardens. Hutton and Harvey J. held the remainder not good to them, because they are not corporate, so as they may take by that grant. Het. 74. Hill. 3 Car. Fawcner's case.

Church-warden is a corporation, and the property of the bells is in him, and he may bring *trover* at common law. 2 Salk. 547. pl. 2. Trin. 4 W. & M. in B. R. Starkey v. the Church-wardens of Watlington.

It is said in the books that the church-wardens are a corporation, but very improperly; for all the parishioners are the body, and the churchwardens are only a name to sue by in personal actions; but the property is in the parishioners; and in all actions brought by church-wardens it must be laid *ad damnum parochianorum*; per Macclesfield C. MS. Rep. Hill. 9 Geo. in cane. Whitmore v. Bridges.——The church-wardens are not a corporation without the parson; per cur. 5 Mod. 396. Pasch. 10 W. 3. in case of Cox v. Copping.

[2. If a *feoffment* be made *to the use of the church-wardens of D.* this is a void use; for they have not any capacity of such a purchase. 17 H. 7. 27. b.]

3. *Gift of the goods of the parish* made by the church-wardens is not good *without the assent* of the side-men and the vestry; and if by the vestry, the same is good. Arg. 3 Bulst. 264. Mich. 14 Jac. in case of Mottram v. Mottram.

For the law gives them power to take things for the advantage, but

not to the *disadvantage* of the church. Yelv. 173. in case of Starkey v. Barton, cites 23 H. 7. 10.

4. Church-warden is a *temporal * officer*. He has the property and custody of the parish goods; and as it is at the peril of the parishioners, so they may choose and trust whom they think fit, and the archdeacon has no power to elect or controul their election. 1 Salk. 166. Hill. 8 W. 3. B. R. Morgan v. the Archdeacon of Cardigan.

* S. P. accordingly per cur. Vent. 267. Hill. 26 & 27 Car. 2. B. R. and says, that his power is en-

larged by sundry acts of parliament.——They are temporal officers by law, and entrusted with the goods of the parish. Comb. 417. Hill. 9 W. 3. The King v. Rica.——12 Mod. 116. S. C. & S. P. by Holt Ch. J.——He is a temporal officer, and to be ordered by the temporal laws. 3 Mod. 335. Hill. 2 W. & M. in B. R. in Leigh's case.——2 Roll. Rep. 71, 72. Hill. 16 Jac. B. R. Mountague Ch. J. said, that a church-warden is not an ecclesiastical but a temporal officer, employed in ecclesiastical business.——A church-warden is not an officer, but a minister to the spiritual court; per tot. cur. Godb. 279. pl. 395. in case of Bishop v. Turner, S. C.

5. As on the one hand the *parson* of the church is a corporation for the taking of land for the use and benefit of the church, and not capable of taking goods or any personalty on that behalf; so the church-wardens * are a corporation to take money or goods, or other personal estate for the use of the church, but are not enabled to take lands; per the master of the rolls. 2 Wms.'s Rep. 126. Hill. 1722. in case of the Attorney-General v. Ruper.

(A. 2) The Power of them, and of the Parish.

S.C. cited by Coventry as resolved. Roll. Rep. 426. in pl. 19.

Roll. Rep. 57. pl. 33. Trin. 12 Jac. B. R. Buckfale's case, S. C. and the par-

son having libelled for this matter in the spiritual court, a prohibition was granted. — If a parish bible be taken out of the church, the church-wardens may have an action at common law. Ibid.

[1. *A Gift by them of goods in their custody, without the consent of the fidemen or vestry, is void.* 38 Eliz. METHOLD AND WINN's CASE, cited per Coventry. My Rep. 14 Jac. B.]

[2. If a man takes the organs out of the church, the church-wardens may have an action of trespass for it; for the organs belong to the parishioners, and not to the parson, and therefore the parson cannot sue in the ecclesiastical court against him who took them. Tr. 12 Jac. B. R. per curiam adjudged.]

[3. The church-wardens by the consent and agreement of the parishioners, may take a ruinous bell and deliver it to a bell-founder, and that he by their agreement shall have for the casting thereof 4 l. and shall retain it till the 4 l. be paid; and this agreement of the parishioners shall excuse the church-wardens in a writ of account brought against them by the successors of the church-wardens; for the parishioners are a corporation for the disposal of such personal things as belong to their church. Mich. 37, 38 Eliz. B. R. between METHOLD AND WINN, adjudged.]

[4. So the church-wardens by the assent and agreement of the parishioners, may take the stones belonging to the church, and with part thereof repair a ruinous window of the church, and retain the rest to themselves in satisfaction of their expences employed in the repairs of the said window. Mich. 37, 38 Eliz. B. R. between METHOLD AND WINN, adjudged.]

5. *Trespass* was brought by the church-wardens against the parson of their parish, for breaking of their field in their ward being, and good, and so see that they are incorporated at common law as to things personal, and they may have appeal and action of account *de bonis ecclesie*, &c. *Contra of things real.* Br. Corporations, pl. 84. cites 11 H. 4. 12. and 12 H. 7. 27.

6. A *feoffment* was made to the use of the parishioners of D. and the church-wardens made a lease for years, and ill. Br. Trespals, pl. 289. cites 12 H. 7. 27.

7. Admitting that church-wardens may remove seats in the church at their pleasure, yet they cannot cut the timber of the pew. Noy, 108. Trin. 2 Jac. C. B. Gilson v. Wright & al'.

8. Church-

Church-wardens.

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8. Church-wardens may take notice of *incroachments on the church-yard*, but not of *sowing of discord among the neighbours*. Vent. 127. Pasch. 23 Car. 2. B. R. Anon.

9. A church-warden may *execute his office before he is sworn*, though it is convenient that he should be sworn; per Cur. said to have been resolved. Vent. 267. Hill. 26 & 27 Car. 2. B. R.

* 10. If the parish was summoned, and refused to meet; or make a rate for the *repairs of the church*, the church-wardens might *make a rate alone*, (if needful,) because, if the repairs were neglected, the church-wardens were to be cited, and not the parishioners: Vent. 367. Trin. 35 Car. 2. B. R. Thursfield v. Jones.

Skin. 27.

pl. 3. S. C.

but S. P.

does not ap-

pear.—

S. P. by

Holt Ch. J.

obiter. Comb. 344. Mich. 7 W. 3. B. R.

11. Ecclesiastical court may punish church-wardens if they will *not open the church to the parson*, or to any one acting under him, but not if they refuse to open it to any other. 3 Salk. 87. Mich.

S. P. and if

the ordinary

had appoint-

ed me to

come and

preach in

12 W. 3. B. R. Church-wardens of St Bartholomew's case.

such a church, yet he could not justify doing it without *consent* of the parson; and if a person give a charity to a certain clerk for *preaching in such a parish*, he must do it by the consent of the parson; per Holt Ch. J. 12 Mod. 433. in case of Turton v. Reignolds.

12. If he that is a church-warden *de facto* makes a rate for *repairing the church*, this will bind the parishioners; per Holt. MS. Cases.

13. If there be a *church-warden de jure*, and a *church-warden de facto*, in the same parish, this latter cannot justify the laying out of, or receiving money, but he is accountable to the church-warden *de jure*; he is no more than another man, per Powel and Powis, and he that is *de jure* may bring an *indebitatus assumpsit* against the other, &c. MS. Cases, Pasch. 9 Ann. B. R. Andrews v. Eagle.

14. Goods given or bought for the use of the church are all *bona ecclesie*, for the taking whereof the church-wardens may bring *trespass*; per the master of the rolls. 2 Wms.'s Rep. 126. Hill. 1722. in case of the Att. Gen. v. Ruper, cites F. N. B. 91. (K) and that he may bring *trespass for the taking* these goods, *as well in the time of their predecessors as in their own time*.

(B) Election.

1. **T**HE canon about *electing a church-warden* is to be intended where the parson had the nomination of a church-warden before the making of the canon. Noy, 139. Mich. 4 Jac. C. B. Anon.

2. *Prohibition* was moved for, because where the custom of the village was, that the parishioners have used to elect two church-wardens, and at the end of the year to discharge one, and elect another in his room, & *alternis vicibus*, &c. by the new canon now the parson has the election of one, and the parish of the

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other, and that he that was elected by the parishioners was discharged by the ordinary at his visitation, and for that he prayed a prohibition, & allocatur as a thing usual, and of course, for otherwise (by Hubbard) the parson might have all the authority of his church and parish. Noy, 31. Butt's case.

And church-wardens chosen by the parish by virtue of a custom cannot be refused by the archdeacon on pretence of poverty or unfitness, and in such case the parish, having appointed him, must be answerable for him. 12 Mod. 116. Hill. 8 W. 3. King v. Rees.

3. Of common right the *choosing* church-wardens belongs to the parishioners. It is true, in some places the incumbent chooses one, but that is only by usage, and the canon concerning choosing church-wardens is *not regarded by the common law*; per Holt Ch. J. who said this was the opinion of Hale Ch. J. Carth. 118. Pasch. 2 W. & M. in B. R. The Church-warden of St. Giles in Northampton's case.

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4. Archdeacon has nothing to do to *refuse*, but admit. Comb. 417. Hill. 9 W. 3. B. R. The King v. Rice.

Custom will prevail against the canon. Vent. 467. Hill. 26 & 27 Car. 2. B. R. Anon.

5. Where the church-wardens are to be elected by the parishioners *by prescription*, it shall not be in the power of the parson to hinder them. Per Cur. 8 Mod. 325. Mich. 11 Geo. in case of the King v. Singleton.

6. It is criminal to *swear one into this office that has no manner of right*, for which crime an *information* will lie; Arg. 8 Mod. 380. Trin. 11 Geo. in the case of the King v. Harwood.

7. In an action for a false return a special verdict found the *custom* to be *for the parishioners of annually to elect a church-warden*; that S. the plaintiff was elected by the parishioners to serve for church-warden for the year 1734, and until another be chosen; that at a vestry the ensuing year, he was re-elected by the parishioners, but at the vestry then holden, the vicar and one church-warden adjourned the vestry to the next day, and the vicar then chose Chapman. A mandamus had been directed to admit and swear in the plaintiff. It was argued for the plaintiff, that the 89th canon of 1603, that all church-wardens and quest-men shall be chosen by the joint choice of the minister and parish, if it may be, if not, then the minister to choose one, and the parish the other, has never been received as law, and cited Cro. Jac. 532. Warner's case. Cro. Car. 551. Hard. 378. and Carth. 118. where Holt Ch. J. says, that where the incumbent chooses one, it is only by usage, and that a church-warden is a temporal officer. Per Lee J. in all councils and elections the general rule is, that the major part binds, and cited 18 E. 4. 2. and Hackwell's *Modus tenendi Parliament*. The Ch. J. said that the question is whether the adjourning by vicar jointly with one church-warden, was a valid and good adjournment, and he thought not; and that if vicar and church-warden had such a power, it must be by custom or by rule of common law; but no custom is found, nor is there any rule of common law to vest this power in the vicar, nor is it in the power of church-wardens to adjourn; and then the right is in the assembly itself. Per Probyn J. the vicar is not a necessary party at the vestry, and judgment for the plaintiff per tot. Cur. MS. Rep. Trin. 1736. B. R. Stoughton v. Reynolds.

(C) Favoured or relieved, or not.

1. **THOUGH** church-wardens are *chosen for 2 years*, yet for cause parishioners may displace them. 13 Rep. 70. cites 26 H. 8. 5.

2. By the canons, no ecclesiastical judge ought to cite any church-warden to the court, but so as he may return home again to his house the same day. 12 Rep. 111. Hill. 10 Jac.

3. For such things as a church-warden does *ratione officii*, no action by the successor will lie against him in the spiritual court. Godb. 279. pl. 395. Hill. 16 Jac. B. R. Bishop v. Turner.

4. Bill against defendants lately church-wardens, because they refused to make a rate to reimburse the plaintiffs according to a vote and order of the vestry; and cited Jefferie's case, 5 Rep. that the majority may bind as to parish duties; it was objected that they should have come when the defendants were church-wardens; that if they had been decreed to pay, they might have reimbursed themselves by a rate; per Serj. Philips, a decree was against Doctor Crowther and his successor,* so here would have it against church-wardens and successors. 2 Vern. 262. pl. 246. Pasch. 1692. Battily v. Coke & al'.

The bill was against the succeeding church-wardens, to oblige them to make a rate according to an order of vestry, to reimburse them several sums of money laid out

by order of vestry, for repairs of the church, and building two new galleries; and their accounts having, at their going out of their office, been taken by auditors, and passed and allowed by the vestry, but the succeeding church-wardens being out of their office, and new ones chose; after examination and publication no remedy lay but in the spiritual court, or against such particular parishioners as employed them, the money for the repairs being all paid, and the remainder due being for the galleries. Ch. Prec. 42. Battily v. Cook.

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5. The plaintiff who was late church-warden, was decreed to be paid the money laid out for the use of the parish with costs, and the decree went on and said, for which purpose the vestry of the said parish are to take notice hereof, (viz. of the decree) and to set a rate accordingly, and what the church-wardens shall pay in obedience to the decree, the same is to be brought into their accounts, and to be allowed them when they pass their accounts with the parish; cited Chan. Prec. 43. in case of Battily v. Cook, as Trin. 2 W. & M. the case of Birch v. Barston & al', church-wardens of Lambeth.

Ibid. cites 36 Car. 2. James v. Rich, S. P.

6. On a dispute between impropriator and parishioners, concerning a right to a house for which he brought an ejectment; the court would not compel the church-wardens to produce the parish books and give him a sight thereof, and copies of what concerned his title, for his and their interest are distinct; for it was not a parochial right, but a title which is now in question, and so no reason to produce the parish books, which would be to shew the defendant's evidence. 5 Mod. 395, 396. Pasch. 10 W. 3. Cox v. Copping.

7. The church-wardens, as church-wardens, received 20 l. for the use of the parish where none was due, and by mistake only, and upon

being *sensible of the mistake, repaid the money.* The succeeding church-wardens brought an action for the money against the former ones; per Powell J. though the old church-wardens could not plead *ne unques receiver*, yet they might *plead this matter specially*; and per Parker Ch. J. it is not necessary to shew re-payment, but only that the money did not belong to the parish; and had they *paid it to the parish before the mistake was known*, the parish would have been charged with this money, and this re-payment was an act done in discharge of the parish, and so a proper plea before auditors. See 10 Mod. 22. Pasch. 10 Ann. B. R. Bishop v. Eagle.

8. In an action by present church-wardens against the former ones, the court was clear that the church-wardens should be *allowed their expences and surpluse*, in case their expences out-balanced, &c. for church-wardens are more than bare receivers, and are in all respects bailiffs. 10 Mod. 23. Pasch. 10 Ann. B. R. Bishop v. Eagle.

9. *Bill against 90 parishioners by executrix of one of the church-wardens of Woodford, to be re-imburfed money laid out by the testator as church-warden, for re-building the steeple of the church.* It was objected that this matter was proper for the ecclesiastical court, and not for this court. But per Harcourt C. the plaintiff is proper for relief in this court, and there are many precedents of the like nature. One in the time of Cowper C. against the parishioners of St. Clement's for the organ in the church, and many more before; and so that objection was over-ruled, and the cause to proceed; and decreed that the parishioners should re-imburse the plaintiff the money laid out by her testator, with costs of this suit, and that the money should be raised by a parish rate. MS. Rep. Pasch. 13 Ann. in Canc. Nicholson v. Masters & al'. Parishioners of Woodford in Com. Essex.

[530] 10. Church-wardens, as being a corporation for the goods of the parish, *commence a suit by and with the consent, and by order of the parish, concerning a charity for the poor, in which they miscarried*, and then *brought a bill against the subsequent church-wardens, to be repaid the costs by them expended*, and had a decree for it. But it was proved that *from time to time the parish was made acquainted with what they did*; and though there was no vestry by prescription, yet a vestry book, kept for the parish acts, was allowed as evidence of their consent, they are the trustees of the parish for all matters, and therefore the costly que trust ill. Parishioners ought to contribute, and not lay the burthen upon these poor people the church-wardens. The annual successive church-wardens need not be made parties, as they are renewed. Per the master of the rolls. MS. Cases, Trin. Vac. 1718. Radnor Parish in Wales.

(D) Actions by or against them; and what Remedy they have when their Time is expired.

1. THE opinion of the court was, that the wardens of the goods of the church should have action of *trespass* of such goods in their ward being taken, notwithstanding that they are not incorporated. Thel. Dig. 21. lib. 1. cap. 23. f. 1. cites Hill. 11 H. 4. 12. and says, that so it was held 8 H. 5. 4. & Trin. 37 H. 6. 30.

Br. Trespas
pl. 200.
cites S. C.
accordingly,
and that it is
said else-
where that
if they die,
their execu-

tors shall have the action of goods carried away in the life of the testator. But Brooke says, quære inde; for the successor cannot have the action, by reason that they are not incorporated.

2. And such writ was brought where the goods were taken in the time of other wardens. Thel. Dig. 21. lib. 1. cap. 23. f. 2. cites Pasch. 19 H. 6. 66. and says, that Fitzh. in the writ of trespass in his Nat. Brev. fol. 91. affirms that such writ lies well.

3. Though the parishioners shall not have account, yet they may appoint new wardens, and they shall have account against the old wardens, and so see that as to things personal they are a corporation by the common law; per Needham. Br. Corporation, pl. 55. cites 8 E. 4. 6.

Thel. Dig.
21. lib. 1.
cap. 23. f. 3.
cites S. C.

4. Trespas by wardens of a church *de libro in custodia sue existente capto & asportato ad damnum parochianorum*, and not ad damnum of the wardens; and good per Littleton & Needham; and here the new wardens shall have action of account against the first wardens. Br. Damages, pl. 124. cites 8 E. 4. 6.

Thel. Dig.
115. lib. 10.
cap. 25. f. 3.
cites S. C.
—S. P. held
accordingly
per Littleton

& Needham J. Br. Corporations, pl. 55. cites S. C.

5. Where an obligation is made to them and to their successors, and they die, their executors shall have action, and not their successors. Thel. Dig. 21. lib. 1. cap. 23. f. 6. cites 20 E. 4. 2.

6. It was said that they shall have action of *trespass*, and *appeal of the goods of the parishioners*, because they are charged with them, &c. Thel. Dig. 21. lib. 1. cap. 23. f. 4. cites Trin. 12 H. 7. 27.

Br. Trespas,
pl. 289.
cites S. C.
that they
may have an

appeal of robbery of such goods.

7. It was held that they should have *ejectione firme*, if they are ejected of land leased to them for years, Thel. Dig. 21. lib. 1. cap. 23. f. 5. cites Trin. 15 H. 7. 8.

8. And they have had action upon the case. Thel. Dig. 21. lib. 1. cap. 23. f. 4. cites Trin. 26 H. 8. 5.

9. If goods of the church are taken away, and afterwards the church-wardens in whose time they were taken away are out of their office, and they bring an action for the goods, they may suppose it to be *ad damnum ipsorum*; or, *ad damnum parochianorum*, at their election; but if the successors bring the action, they must of necessity suppose it *ad damnum parochianorum*. Agreed per Cur.

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Church-wardens.

and judgment accordingly, though the justices at first conceived that the predecessor church-warden could not have action, his time being past. Cro. E. 145. pl. 5. Mich. 31 & 32 Eliz. C. B. and *ibid.* 179. pl. 11. Pasch. 32 Eliz. B. R. Hadman v. Ringwood.

10. A church-warden, by the common law, may maintain an action on the case for *defacing of a monument* in the church. Godb. 279. pl. 395. Hill. 16 Jac. B. R. Bishop v. Turner.

11. *Writ issued to the bishop*, commanding him to admit a church-warden elected by the parish. Palm. 50. Mich. 17 Jac. B. R. The Parish of St. Balaunce in Kent.

12. A prohibition was prayed to the archdeacon of Exeter, because he proceeded to excommunicate the plaintiff, for that he, being church-warden, *refused to present a notorious delinquent, being admonished*; and a prohibition was granted; for they are not to direct the church-warden to present at their pleasure; but if one church-warden does refuse to present, he may be presented by his successor. Freem. Rep. 298, 299. pl. 356. Hill, 1680. Selby's case, cites 13 Rep. 5.

13. Action lies for *citing church-warden to account, that has accounted before*, though nothing more is done, and though nothing ensued but an excommunication, and no *capias* nor any express damage laid. 2 Show. 145. pl. 121. Mich. 32 Car. 2. B. R. Gray v. Dight, alias Day.

14. If money be *disbursed* by church-wardens for *repairing* the church, or any thing else merely ecclesiastical or spiritual, the spiritual courts shall allow their accounts; but if there be any thing else that is an agreement between the parishioners, the succeeding church-wardens may have an action of account at law, and the spiritual court has not jurisdiction. 12 Mod. 9. Mich. 3 W. & M. in B. R. Styrtrop v. Stoakes.

Br. Tref-
pass, pl. 200.
cites 37 H.
6. 30. S. P.

15. The goods of the parish are in his custody, and he may have *trespass* for them; per Holt Ch. J. 12 Mod. 116. Hill. 8 W. 3. The King v. Rees.

16. The succeeding church-wardens may have an action against their predecessors for the goods of the parish. Comb. 417. Hill. 9 W. 3. B. R. in case of the King v. Morgan Rice.

17. Church-wardens may *bring actions* for debts due to the parish in their own names; for they are a corporation. Agreed. Farr. 116. Mich. 1 Ann. B. R. in case of Thimblethorp v. Hardesty.

18. If there be a *custom* for the church-wardens to *collect money for the parish clerk*, an action on the case will lie against him for *not doing it*. 6 Mod. 253. Mich. 3 Ann. B. R. in case of Parker v. Clerk.

19. The parishioners may call the church-wardens *into the spiritual court for the money that they have received*. MS. Cases, Mich. 7 Ann. B. R. Holloway v. Knight; but quere if one or two of the parish may do this when all the rest are agreed.

20. If church-wardens *receive money by mistake*, (it not being due to them,) *and before knowledge of the mistake pay it over to the parish*

parish for whose use they received it, whether they may, after they are out of their office, be charged in an indebitatus assumpsit for the money, was made a question, and Powell J. thought they might, but Parker Ch. J. thought they could not. See 10 Mod. 23. Pasch. 10 Ann. B. R. in case of Eagle and Bishop.

21. Two justices made an order, to compel the present church-wardens of Ely to pay to the precedent ones, or their executors, 40 l. quashed * per Cur. for they have no such authority. 2 Shaw's Pract. Just. 29. cites Hill. 1712. The Church-wardens of Ely's case.

Shaw's Parish Law, 199, 200. cites S. C. — Ibid. 220. cites S. C.

For more of Church-wardens in general, see Prohibition, and other proper titles.

Circuity of Action.

(A) Circuity of Action; and what is a Bar to it.

1. IF I grant to my tenant to hold without impeachment of waste, or a lord grants to his tenant that he shall not be punished in cessavit, &c. or the king grants to one to be discharged of fines, the same may be pleaded by rebutter, and the party not put to bring his action of covenant, or to sue by petition. Heath's Max. 44, 45. cites 19 H. 6. 62.

19 H. 6. 62. b S. P. by Palton.

2. And so it seems of waste in 21 H. 6. 47. [though] the grant [be] by lease, whereof doubt is made afterwards in 21 H. 7. 23 & 30. where the principal case was, that the obligee granted, that if he did implead the obligor (before such a day) the obligation should be void, and a good bar; and upon that reason shall the garnishee, or tenant by receipt, rebutt by a release or warranty. Heath's Max. 45.

Br. Barre, pl. 52. cites S. C. & S. P. by Coningsby and Elliot; but Moore and Tremayle contra, that it was only

a sparing for the time, and no release; and Fineux Ch. J. at first to the same intent, that it sounds only in covenant; and that if the party breaks the covenant, he shall only have an action of covenant; as where a man grants to his tenant, that he will not distrain him before Michaelmas, there, if he distrains, the tenant shall only have an action of covenant. But Brooke says, quere inde; for it seems it shall be pleaded in bar to avoid circuity of action. And per Fineux, if one leases land for life or years, and after grants by another deed, that the lessee shall not be impeached of waste, and the lessor brings waste, there the lessee shall have only action of covenant. But Brooke says that the practice is e contra; for he may plead it in bar to avoid circuity of action. But afterwards Fineux changed his opinion, and took a difference between a defence of an obligation and a condition of an obligation, and held that this grant made the obligation void; and so Fineux, Coningsby, and Elliot, were against Tremayle and Moore. — Br. Grants, pl. 53, cites S. C. & S. P. accordingly. — Br. Defence,

sance, pl. 19, cites S. C. and Brooke says, that the best opinion was, that it is a good defence in bar of the action; for action personal once suspended is gone for ever; but that it is said, that it cannot enure as a release or acquittance, but as a defence. — S. S. cited Pl. C. 156. b.

3. And upon the reason aforesaid it is, that where one thing is granted in law *so* [for] another, especially of things executory, and not executed, if he be interpleaded of that which to him appertains, he shall plead the same in bar of that whereof he made the grant, as appears by Perkins in the title of Exchanges, where rent is granted for distress. Heath's Max. 45.

[533] 4. But yet by 15 Ed. 4. [2.] 9 E. 4. [19.] and 24. E. 3. [54.] abridged by Brooke, tit. Conditions, pl. 61. it seems in that case to be to the contrary, because executed, and therefore not like where an annuity is granted *pro consilio*; the like where one holds to inclose taking the ancient pale, or where one grants to me an annuity to have a gorse, or a gutter in my land, because an easement. Heath's Max. 45.

5. In assise which remains for default of jurors, and after the plaintiff releases, this shall be pleaded to avoid circuity of action, by certificate of assise after. And *so* where a man is bound in a statute, and after releases, the defendant shall have *venire facias*, and this in avoidance of circuity of action by *audita querela*. Br. Garnish, pl. 9. cites 20 H. 6. 28.

6. A. covenanted with B. to collect B.'s rent in D. and for not collecting them B. brought covenant. A. pleaded that B. himself interrupted his collecting the same; judgment si actio, &c. It was insisted, that the plea was not good; for if it was, then action of trespass lay against B. in which A. might recover his damages. But the court held the plea good in avoidance of circuity of action; for if A. should bring trespass and recover damages, then B. should have writ of covenant against A. and recover, which circuity of action the law will not suffer, &c. Kelw. 34. b. 35. a. pl. 2. Hill. 13 H. 7. Anon.

Br. Cove-
nant, pl. 12.
cites S. C.

7. If you covenant to serve me, and I to give you 5 l. for your service, or you covenant to marry my daughter, and I, in like manner, to give you 20 l. as a marriage portion, if you serve me not, or marry not my daughter, I may plead the same in bar; otherwise if the covenant on either part had been express, and not depending upon the other's act. Heath's Max. 45, 46. cites 15 H. 7. 10.

8. Circuity of actions is where there is an equality to be recovered in both actions. Mo. 23. pl. 80. Pasch. 3 Eliz. Anon.

Cro. E. 252.
pl. 7. Deutz
v. Jeffries,
S. C. ac-
cordingly, as
to the prin-
cipal point,
that it is not
to be pleaded
in bar, but

the party is put to his writ of covenant if he be sued before the time; but if the covenant had been not to sue at all, there, peradventure, it might enure as a release, and to be pleaded in bar, but not here; for it never was the intent of the parties to make it a release, and it was adjudged for the plaintiff.

9. If A. enters into an obligation to B. and B. covenants not to put the bond in suit before Mich. and B. brings debt before Mich. A. cannot plead this in bar, but must bring action of covenant; but if the covenant had not been to sue at all, it is reasonable in such case, to avoid circuity of action, to allow its being pleaded in bar of the action, but not in the other case. And. 307. pl. 316. Trin. 36 Eliz. Dowse v. Jeffries.

10. Debt on a bond of 200 l. The defendant pleaded, that after the bond made, the plaintiff covenanted by indenture shewn in court, that if the defendant should at such a day pay 100 l. the bond should be void, and alleged, that he paid the money at the day; and upon demurrer all the court held, that he may well plead it in bar, without being put to his writ of covenant by circuity of action. Cro. E. 623. pl. 16. Mich. 40 & 41 Eliz. B. R. Hodges v. Smith.

11. In debt for rent on lease for years; the defendant pleaded in bar, that the lessor did covenant that the lessee might deduct so much for charges, and upon demurrer this was adjudged a good plea, it being a thing executory, and the covenant in the same deed, and the party shall not be put to circuity of action, and to bring action of covenant. Lev. 152. Mich. 16 Car. 2. B. R. Johnson v. Carre.

But not where the covenant is in another deed; for the last deed has not taken away the effect of the former; and a later covenant cannot be pleaded in bar of a former; but the defendant must bring his action upon the last indenture if he would help himself, and judgment accordingly per tot. cur. 2 Vent. 217, 218. Mich. 2 W. & M. in C. B. Gawden v. Draper.

12. If A. and B. are jointly and severally bound to H. and H. covenants with A. that he will not sue A. this is not a defeasance, for still there is a remedy on bond against B. Otherwise if A. only had been bound, for then such covenant excludes him from any remedy for ever, to avoid circuity of action; per cur. 2 Salk. 575. pl. 3. Pasch. 13 W. 3. B. R. in case of Lacy v. Kinaston. [534]

13. *Infinutum in jure reprobatur.* See Maxims.

For more of Circuity of Actions in general, see Bar, and other proper titles.

(A) Circumbention.

1. **A** BILL to be *relieved against a bill of sale.* The case was, A. being in prison, B. his landlord came to him, and pretending friendship, and to procure his enlargement, persuaded A. to make over his stock, &c. to him, and he would pay A.'s debts, and return the overplus. A. made a bill of sale, and B. possessed himself of the goods, and more than was contained in the bill of sale, but paid no debts, nor got him out of prison as he had *promised.* The court being satisfied the bill of sale was *made on a trust,* decreed an account. Fin. Rep. 175. Mich. 26 Car. 2. Jones v. Prior.

2. Assumpsit,

2. Assumpsit, that in consideration of half a crown by the plaintiff in hand paid to the defendant, he promised to pay 2 grains of rye upon Monday the 29th of March in such a year, 4 grains the next Monday after, and so on by progression arithmetic every Monday for a year, and non assumpsit pleaded. Per Cur. upon motion, let them go to trial; and though this would amount to a vast quantity, yet the jury will consider of the folly of the defendant, and give but reasonable damages against him. 6 Mod. 305. Mich. 3 Ann. B. R. Thornborough v. Whitacre.

In this case it was decreed that the defendant do account for the rents and profits of the freehold leases to the plaintiff, and the defendant to have all just allowances for debts and incumbrances paid by him, and the plaintiff to account for 150 guineas to the defendant, with interest, &c. As to the purchaser bona fide of part of the freehold lands, he shall reconvey to the plaintiff, upon payment of the purchase-money with

3. Francis Broderick being seized of a considerable estate in fee, made his will, and devised it to Thomas Broderick the defendant. Francis himself *executed the will*, but it was *not attested in his presence by 3 witnesses*. Francis died, and the defendant Thomas finding that the will was void, for 100 guineas paid by him to the plaintiff George Broderick, who was Francis's heir at law, *procured from the plaintiff a release, which recited that Francis, by his last will duly executed, had devised his estate to the defendant Thomas; and the defendant Thomas thinking himself not safe with the release only, for 50 guineas more prevailed with the plaintiff to convey the lands by lease and release to one Day, who was trustee for the defendant Thomas, to whom Day afterwards conveyed*. Afterwards the defendant Thomas, upon a valuable consideration, conveyed part to one Parker, who had not any other notice of the invalidity of the will, save that he heard it mentioned in common discourse. The plaintiff brought his bill against the said T. Broderick, Day and Parker, to have the release, lease, and release delivered up as fraudulently obtained; and it not appearing that the plaintiff, at the time of his making the release, &c. knew that the will was bad, the Ld. C. Harcourt decreed that they should be delivered up; and it not appearing that Parker was privy to the fraud, though he had heard of the invalidity of the will as above, it was decreed * that he, upon receiving his purchase-money with interest, should convey to the plaintiff, and should account for the rents and profits which he had received, and be allowed what he had laid out in repairs or otherwise. MS. Rep. Mich. 12 Ann. Canc. Broderick v. Broderick & al'.

interest at 5l. per cent. because he had notice of the invalidity of the devise by common report, though not actual notice from the plaintiff or defendant; and though he was not a fraudulent purchaser, yet he was a rash one, and ought to have inquired into the validity of the will, or got the heir at law to join in the conveyance to him; per Harcourt C. Ex relatione alterius.

* [535]

4. Dr. Dent being parson of the parish of C. in Essex, and Sir . . . Buck having lands in that parish, told Dr. Dent that there was a *modus of 40 s. per ann. paid time out of mind* for his lands in the parish; and to satisfy and convince the doctor of it, he *shewed a copy of a record in B. R. tempore Eliz. where a prohibition was granted against the parson in a suit for tithes in court-christian upon a suggestion of this modus; whereupon Dr. Dent did agree with Sir . . . Buck to take 40 s. per ann. for the tithes of Sir . . . Buck's lands in that parish; but it appearing*

in the cause that Sir — Buck did suppress part of the record, wherein afterwards a consultation was granted, and thereby deceived Dr. Dent, and drew him into this agreement, for that reason the lords did make void the agreement, being obtained by suppressing the truth. MS. Rep. Mich. 12 Ann. in Canc. cited in case of Broderick v. Broderick, as the case of Dr. Dent v. Buck in Dom. Proc.

For more of Circumvention in general, see *Cobin, Fraud, Release* (Y. a.) and other proper titles.

Citation out of the Diocess.

(A) By Statute of Hen. 8.

1. 32 H. 8. cap. 9. *N*O person shall be cited before any judge spiritual out of the diocess, or particular jurisdiction where the person cited shall be inhabiting, except for any spiritual offence, or cause done or neglected, by the bishop or other person having spiritual jurisdiction, or by any other person within the jurisdiction whereunto he shall be cited;

S. 3. And except it be upon matter of appeal, or for other lawful cause wherein any party shall find himself grieved by the ordinary, &c. of the diocess, &c. after the matter there first commenced; or in case the bishop, &c. will not convene the party to be sued before him; or in case the bishop, &c. be party to the suit, or in case any bishop, &c. makes request to the archbishop or superior ordinary to take the matter before him, and that only where the law civil or canon doth affirm execution of such request to be lawful, upon pain of forfeiture, to the person cited, of double damages and costs, to be recovered against such ordinary, &c. by action of debt, and upon forfeiture of every person so cited 10 l. one half to the king, and the other half to any one that will sue for the same.

* S. 4. Provided that it shall be lawful for every archbishop to cite any persons inhabiting within his province for causes of heresy, if the ordinary immediate consent; or do not his duty.

S. 5. This act shall not extend to the prerogative of the archbishop of Canterbury, of calling persons out of the diocess for probate of testaments.

S. 6. No archbishop, &c. shall demand any money for the seal of a citation than only 3d. upon the penalties before limited.

S. 7. This act shall not be prejudicial to the archbishop of York, concerning probate of testaments within his province.

Resolved, that the body of the act is, that no manner of person shall be henceforth cited before any ordinary, &c.

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Lewis and Rochester who dwell in Essex, in the diocess of London, were sued for subtraction of tithes growing in B. in the said county of Essex, by Porder in the court of arches of the archbishopric of Canterbury in London, where the archbishop has a peculiar jurisdiction of 13 parishes, called a deanry, exempt from the authority of the bishop of London, whereof the parish of St. Mary de Arcubus is the chief. Resolved, that the body of the act is, that no manner of person shall be henceforth cited before any ordinary, &c.

&c. out of the diocess or peculiar jurisdiction where the person shall be dwelling; and if he shall not be cited out of the peculiar before any ordinary, a fortiori, the court of arches, which sits in a peculiar, shall not cite others out of another diocess; and these words (out of the diocess) are to be meant out of the diocess or jurisdiction of the ordinary where he dwells, but the exempt peculiar of the archbishop is out of the jurisdiction of the bishop of London, as St. Martin's, and other places in London, are not part of London, although they are within the circumference of it. It is to be observed, that the preamble reciting the great mischief, recites expressly, that the subjects were called by compulsory process to appear in the arches, audience, and other high courts of the archbishopric of this realm; so as the intention of the said act was to reduce the archbishop to his proper diocess, or peculiar jurisdiction, unless it were in 5 cases: 1st, For any spiritual offence or cause committed or omitted, contrary to the right and duty, by the bishop, &c. which word (omitted) proves that there ought to be a default in the ordinary. 2^{dly}, Except it be in case of appeal, and other lawful cause, wherein the party shall find himself grieved by the ordinary, after the matter or cause there first begun; ergo, the same ought to be first begun before the ordinary. 3^{dly}, In case that the bishop of the diocess, or other immediate judge or ordinary, dare not or will not convene the party to be sued before him, where the ordinary is called the immediate judge, as in truth he is, and the archbishop, unless it be in his own diocess (these special cases excepted) immediate judge, viz. by appeal, &c. 4^{thly}, Or in case that the bishop of the diocess, or the judge of the place within whose jurisdiction, or before whom the suit by this act should be begun and prosecuted, be party directly or indirectly to the matter or cause of the same suit, which clause in express words is a full exposition of the body of the act, viz. that every suit (other than those which are expressed) ought to be begun and prosecuted before the bishop of the diocess, or other judge of the same place. 5^{thly}, In case that any bishop, or any inferior judge, having under him jurisdiction, &c. make request or instance to the archbishop, bishop, or other inferior ordinary or judge, and that to be done in cases only where the law civil or common doth affirm, &c. by which it fully appears that the act intends that every ordinary and ecclesiastical judge should have the consueance of causes within their jurisdiction, without any concurrent authority or suit by way of prevention; and by this the subject has great benefit, as well by saving of travel and charges to have justice in his place of habitation, as to be judged where he and the matter is best known; as also that he shall have as many appeals as his adversary in the highest court at the first. Also there are 2 provisos which explain it also, viz. that it shall be lawful for every archbishop to cite any person inhabiting in any bishop's diocess within his province for matter of *benefit* (which were a vain proviso if the act did not extend to the archbishop; but by that special proviso for *benefit*, it appears that for all causes not excepted it is prohibited by the act). Then the words of the proviso go further, if the bishop or other ordinary immediately hereunto consent, or if the same bishop or other immediate ordinary or judge, do not his duty in punishment of the same; which words (immediately) and (immediate) expound the intent of the makers of the act. 2^{dly}, There is a saving for the archbishop, the calling any person out of the diocess where he shall be dwelling in the probate of any testaments; which proviso should be also in vain, if the archbishop, notwithstanding that act, should have concurrent authority with every ordinary through his whole province; wherefore it was concluded that the archbishop out of his diocess, unless in the cases excepted, is prohibited by the act of 23 H. 8. to cite any man out of any other diocess. Resolved 13 Rep. 4. 6. pl. 2. Mich. 6 Jac. C. B. Porter v. Rochester.—S. C. cited Arg. 5 Mod. 451.

Holt Ch. J. 2. If one in Norfolk comes within another diocess, and commits adultery in the other diocess during the time of his residence, he may be cited in the diocess where he committed the offence, though he dwell out of the diocess; per Coke, Warburton, & Winch, J. Brownl. 45. Anon.

have a jurisdiction when a man of another diocess is taken *flagranti delicto*; but Holt said that where the party goes into another diocess, and is commorant there, and he comes back casually into the first diocess, then the citation cannot be good; for suppose a man comes casually into the diocess of London, and commits a crime there, and then goes back to the diocess where he dwells, and then casually comes to London again, I do not think he can be here cited; but if he had been cited before he left London, then that would be *flagranti delicto*. Holt's Rep. 605. pl. 18. Trin. 5 Ann. in case of Wilmett v. Loyd.

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S. C. cited Arg. 5 Mod. 452.

3. If a man inhabits in the diocess of A. and has cause to sue for tithes in the diocess of A. in which he inhabits, and also for tithes in the diocess of B. he ought to sue in the diocess in which the defendant did inhabit, and not in the diocess where the tithes are payable, nor where the plaintiff inhabits. Agreed. 2 Brownl. 28. Trin. 9 Jac. C. B. in case of Jones v. Boyer.

4. The

4. The exception in this statute *extends only to probate of wills*; S. C. cited said by Warburton, J. to have been agreed by all the justices. Arg. Gibb. 110. Mich. Godb. 214. pl. 306. Mich. 11 Jac. C. B. in Hughes's case. 3 Geo. 2. B. R. in the

case of Edgworth v. Smallridge, where the case was, that a prohibition was prayed to a suit for a legacy in the arches against the executor, for that he was cited out of his diocess, contrary to 23 H. 8. cap. 9. and it appeared that the testator having *bona notabilia* in several diocesses, his will was proved in the prerogative court of Canterbury. Dr. Andrews for the defendant insisted, that the exception of the probate of wills draws after it, necessarily, an exception of suits arising upon such wills proved; that the 23 H. 8. is an affirmation of the canon law. Now by the canon law a will cannot be proved in the arches, nor can legacies be sued for in the prerogative court, which is a point mistaken by the reporters, who say the legacy must be sued for where the will is proved. Both the prerogative and the arches are within the archbishop's jurisdiction; and if the legatee is not suffered to sue in the arches, he can sue no where; and Fazakerley, of the same side, cited 1 Vent. 233. and as a case in point; and the court denied the prohibition.

5. It was held per cur. that this act did *not extend to the high commission court*; for that was erected in 1 Eliz. and therefore it was not the intent of the 23 H. 8. to provide for a court which was not then in esse. Roll. Rep. 174. pl. 10. Pasch. 13 Jac. B. R. Ballinger v. Salter.

11. Note, a prohibition was awarded upon the 23 H. 8. because the party was sued out of the diocess; and now a consultation was prayed, because the inferior court had *remitted that cause to the Arches*, and their jurisdiction also, yet a consultation was denied; for it ought to be pleaded upon the prohibition. Noy, 89. Trin. 2 Car. B. R. Anon.

12. Upon view of the statute, it appears clearly that it *extends as well to suits out of the peculiar jurisdiction*, as to suits out of the diocess. Cro. C. 162. pl. 3. Mich. 5 Car. B. R. Kadwalladar v. Brian.

13. Prohibition was granted to the bishop of Sarum, for citing one out of his diocess, to appear at his court at Sarum, whereas the party was living in London. But it being a *suit for tithes of lands* in the diocess of Sarum, the court, upon notice thereof, granted a consultation, because the land lying in the diocess of Sarum, the suit cannot be elsewhere, let the defendant live where he will, and so this case is not within the statute; and a consultation was granted. Lev. 96. Pasch. 15 Car. 2. C. B. Westcote v. Harding.

14. The court held that if a man is *cited within the diocess, though he be not an inhabitant there, but comes thither to trade only, or otherwise*, such citation is not within the statute; and if it were otherwise, there might be offences committed against the ecclesiastical law, which would not be punished at all; for men would offend in one county and then remove to another, and so escape with impunity. Hardr. 421. pl. 8. Trin. 17 Car. 2. in the exchequer, Dr. Blackmore's case.

15. He that would have advantage of the statute for citing out of the diocess *must come before sentence*. Vent. 61. Hill. 21 & 22 Car. 2. B. R. Anon. See pl. 17.

16. A prohibition was prayed to the ecclesiastical court, for that they cited one out of a diocess to answer a *suit for a legacy*, but it was denied, because it was *in the court where the probate of the will was*; S. P. by Holt Ch. J. H. K's Rep. 603. pl. 17.

Trin. 5
Ann. in case
of Wilmet
v. Loid.

was; for though it was before commissioners appointed for probate of wills in the late times, yet now all their proceedings in such cases are transmitted into the prerogative court, and therefore suits for legacies contained in such wills ought to be in the archbishop's court; for *there the * executor must give account and be discharged*, &c. Vent. 233. pl. 1. Hill. 24 & 25 Car. 2. B. R. Anon.

By pleading
he had ad-
mitted the
jurisdiction
of the court,

17. Prohibition does not lie *after plea* pleaded for citing out of the diocels. Cumb. 105. Pasch. 1 W. & M. in B. R. cites the case of Vanacre v. Spleen.

and the statute 23 H. 8. takes not away the jurisdiction of all matters arising out of the diocels, but only gives him, that lives out of it, a new privilege of pleading to the jurisdiction, which if he neglects he shall not have prohibition after a sentence. Carth. 33. cites the case of Vanacre v. Spleen.

3 Keb. 562. pl. 78. Mich. 27 Car. 2. B. R. Vanacre v. Spleen, is that a prohibition lies as well after sentence as before, and whether an appeal be depending or not; but nothing appears as to citation. — S. C. cited by Dolben J. as adjudged in Ld. Hale's time, in which he was of counsel; and that it being moved afterwards, Ld. Ch. J. North allowed the said case to be good law. Holt Ch. J. said, it was reasonable that it should be good law, but he doubted of it. Comb. 105. 109. in S. C.

18. A *libel* was for words, and a prohibition was moved for, because the words mentioned in the libel were *not spoken within the diocels*, &c. But per Cur. the jurisdiction is not local as to the cause of action, but as to the residency of the person; and if the person lives within the diocels, it is not material where the words were spoke. Comb. 105, 106. Pasch. 1 W. & M. in B. R. Anon.

S. C. cited
Arg. 5 Mod.
452. —
3 Mod. 211.
Woodward's
case, S. C.
Pasch. 4 Jac.
2. B. R. but
held e con-
tra. —
Comb. 132.
Trin. 1 W.
& M.
Woodward

19. W. lived in the diocels of Litchfield and Coventry, but occupied lands in the parish of D. in the diocels of Peterborough, and was there taxed in respect of his land as an inhabitant towards a rate for new casting of the bells; and because he refused to pay, was cited into the court of the bishop of Peterborough, and libelled against for this matter. Per Cur. this is not a citing out of the diocels within the statute 23 H. 8. cap. 9. for he is an inhabitant where he occupies the land, as well as where he personally resides. 1 Salk. 164. pl. 1. Trin. 1 W. & M. in B. R. Woodward v. Makepeace.

v. Mackpeth, S. C. and a consultation was awarded; and Holt Ch. J. compared it to the statute of Winton, where he shall be an inhabitant within the hundred, that occupies land within the hundred.

Carth. 476.
S. C. and
the court
held the suit
local, and a
prohibition
was denied.
— 5 Mod.
450. S. C.
says the libel
against him
in the spiri-
tual court at
York, was
7 years after
his removal
from the
diocels of

20. A. lived in N. within the province of York, and subtracted tythes there, and then removed to M. within the province of Canterbury; after he happened to go to York and was there sued in the archbishop's court for the subtraction, and had a prohibition on the 23 H. 8. 9. But after debate a consultation was awarded; because the subtraction of the tythes is local, and must be sued before the ordinary of the place where the wrong was done, otherwise in cases transitory, ubi forum sequitur reum. And as it was argued by the counsel, this is not citing out of the diocels within the statute, because the diocels where he lives has not a jurisdiction; and if he might not be cited in this case, the thing would be remediless and unpunishable. 2 Salk. 549. Mich. 11 W. 3 B. R. Machin v. Malton.

York; the case was argued for a prohibition, but the court put off giving their opinions to the next term.

term. — 12 Mod. 252. S. C. says that A. lived all his life at Lincoln, and at the end of 7 years after the subfraction, he being at York as an evidence was served with a citation. A prohibition was granted because the case was doubtful, that it might be settled. But afterwards in Hill. Term upon deliberation, a consultation was awarded per tot. Cur. — Ibid. the reporter adds a nota, viz. See the words of 32 H. 8. cap. 7. *That the party shall be sued before the ordinary of the place where the subfraction was.* [I do not observe this point taken notice of in the Abidgments, either of Wing. or Coz; but the words of the said statute are according to the said note, viz. that the party wronged or grieved, shall and may convene the person or persons so offending before the ordinary, his commissary, or other competent minister or lawful judge of the place where such wrong shall be done, according to the ecclesiastical law, and in every such case or matter of suit, the same ordinary, &c. having the parties or their lawful procurators before them, shall and may, by virtue of this act, proceed to the examination, bearing, and determination of every such cause or matter, ordinarily or summarily, according to the course and process of the said ecclesiastical laws; and thereupon may give sentence accordingly.] — 3 Salk 90, 91. pl. 2. S. C. and says this case was ruled to stand upon a single reason; for whatever the law might be in other instances, yet in the case of tithes, the statute 32 H. 8. expressly enacts, that the party * subfractioning them shall appear before the ordinary of the diocess where they were subfractioned; and therefore a consultation was granted in this case. — a Lutw. 1057. S. C. but S. P. does not appear.

* [339]

21. F. libelled against G. in the spiritual court for *cohabitation*, claiming a marriage with her, and prohibition moved for, upon suggestion that the citation was to answer out of the diocess, it being to ecclesiastical court of peculiar of Westminster, whereas she lived in Chester; but it appearing by affidavit, that she dwelled for a considerable time in London diocess, and even to the very day of the citation, which was served upon her just as she was going away; the court would not grant a prohibition. 12 Mod. 610. Hill. 13 W. 3. Fenwick v. Lady Grosvenor.

22. Libel against the defendant in the spiritual court at Worcester, for getting his brother's wife with child, and he prays a prohibition, because he went to live at York a year before he was cited, though it was after the woman was said to be with child, and that he has a dwelling in Yorkshire, but coming to Worcester to choose parliament men he was served with a libel. Holt Ch. J. said if you appeal for want of jurisdiction, you may still have a prohibition for that, because you contest the same; but if you appeal upon the merits or propter gravamen, though you insist on the jurisdiction of the court by protestation, yet this shall be taken for an admission of the jurisdiction; adjournatur. Holt's Rep. 603. pl. 17. Trin. 5 Ann. Wilmett v. Loid.

Ibid. pl. 18. the S. C. was argued by civilians. Powell J. said, suppose W. had only lived in Worcester when this crime was committed, and then before the crime was found out he went to live

in York; this perhaps shall not oust the court of W. out of the jurisdiction which was well begun there. Holt Ch. J. contra, because a citation is in nature of a process, which in its nature cannot be of force in another diocess. But that point was no more insisted upon, being out of the case. Holt Ch. J. Powis and Gould said this case was too nice to be determined on a motion, therefore let a prohibition go, and let W. declare forthwith. I am not giving any opinion, said Holt Ch. J. but I think if the citation be wrong, though that W. did plead informally to the jurisdiction, and also appealed, yet all the proceedings below must fall to the ground.

For more of Citation in general, see Prohibition, and other proper titles.

Clerk of the Market.

(A) Clerk of the Market. His Power.

1. **W**Hether a clerk of the market can *break pots not being measure*? Attorney general said that he could not, but must order them according to the form of the statute. Savil. 57. pl. 122. Pasch. 25 Eliz. Anon.

2. At the motion of Coke attorney of the queen, all the justices of England assembled at Serjeant's-inn, upon extortions committed by the clerks of the markets, because they had *taken 1d. fee for the view of vessels, though they found not any defect in them, and sealed them not, and if they did seal them they took 2d.* [540] And all the justices agreed that this was grand extortion, and that *no prescription can serve for taking a fee for the view only, unless they found default or sealed them.* Mo. 523. pl. 690. Mich. 39 & 40 Eliz. Anon.

3. Clerk of the market has to do with nothing but *visuals.* Het. 145. Trin. 5 Car. C. B. Cambridge University's case.

4. In trespass defendant justified as clerk of the market within, &c. for a *distress* of 3s. 4d. for not using *measures marked according to the standard* of the exchequer. On demurrer it was urged for the defendant, that this was an authority given by the 14 E. 3. cap. 12. f. 2. and held per Holt Ch. J. that the clerk of the market could not have power to extort fines and amerciaments otherwise than as a franchise, and it is more reasonable the clerk should bring the standard with him, than that the people should follow him, or attend at a place out of the market. 1 Salk. 327. Trin. 8 Ann. B. R. Burdett's case.

For more of Clerk of the Market in general, see **Market** (A. 2) and other proper titles.

(A) Clerk of a Parish.

1. **T**HE clerk of a parish *prescribed*, that he and his predecessors had used to have 5s. per ann. of the parson for the tithes of a certain place within the parish, but a consultation was awarded, because a clerk dative and removeable cannot prescribe. Mo. 908. pl. 1274. 29 & 30 Eliz. Savell v. Wood.

Cro. E. 71.
pl. 26. S. C.
and it was
moved, that
it was a good
prescription,
because the

parsonage was a parsonage impropriate, and by intendment it commenced by the act of the parson, viz. that he made a composition that the tithe of that land should be paid to the clerk in discharge of himself, and that he had used time out of mind, &c. to pay to the clerk 5s. in discharge of all tithes, &c. and the court said, if this special matter be shewn in the surmise, perhaps it might be good by reason of the continuance, and that by this the parson is discharged from finding the clerk, with which perhaps he shall be charged, and so is as a payment of tithes to the parson himself; but such matter is not shewn, and by common intendment tithes are not to be paid to the parish clerk, and he is no party in whom a prescription can be alleged, and thereupon they awarded a consultation. — Le. 94. pl. 122. S. C. accordingly.

2. It was held, that a parish clerk is a mere layman, and ought to be deprived by them that put him in, and no others; and if the ecclesiastical court meddle with deprivation of the parish clerk, they incur a præmunire, and a canon, which wills, that the parson shall have election of the parish clerk, is merely void to take away the custom that any had to elect him. 2 Brownl. 38. Pasch. 8 Jac. C. B. Gaudy v. Newman.

Godb. 163.
pl. 228.
Pasch. 8.
Jac. C. B.
Candlish v.
Plomer,
S. P. —
Le. 94, 95.
pl. 122.
S. P. by

Clench. — 13 Rep. 70. pl. 34. Anon. S. C. and though where a clerk is chosen by custom by the parishioners, he is not deprivable by the official, yet upon occasion the parishioners might displace him, cites 3 E. 3. Annuity, 70. — And ibid. says, though the execution of the office concerns divine service, yet the office is merely temporal.

3. Resolved, that if the parish clerk *misdemean himself in his office*, or in the church, he may be sentenced for it in the ecclesiastical court to excommunication, but not to deprivation. 2 Brownl. 38. Pasch. 8 Jac. C. B. Gaudy v. Newman. [541]

4. Parish clerk may *sue in court christian for his fees*, which are called *largitiones charitative*. Arg. cites the Register, fol. 52. for he is quodam modo an officer spiritual, cites 21 E. 4. 47. 2 Roll. Rep. 71. Hill. 18 Jac. B. R. in Bishop's case.

5. In *case* the plaintiff declared, quod cum extitisset clerk of such a parish; the defendant disturbed him in the exercise of his office, and hindered him to sit in the clerk's seat, per quod he lost the profits of his office. It was objected, that this was rather a service or employment than an office; that if it be an office, it is ecclesiastical, for of common right the parson appoints the clerk, and the court will not intend a custom; and unless a clerk comes in by the election of the parishioners, according to custom, he has not a temporal right, and the court will not grant a mandamus for a clerk, without an affidavit that he is appointed by the parish. 2dly,

Clerk of a Parish.

It does *not* appear that any fees appertain unto his office, and no action lies at common law for disturbance in the enjoyment of a seat in the church without a temporal right, and so it is here; adjournatur. 2 Salk. 468. pl. 7. Trin. 4 Ann. B. R. Lee v. Drake.

After the parson has put in a clerk, he is then the

clerk of the parish, and not the parson's clerk only, and therefore he *cannot turn him out at pleasure*; per Holt Ch. J. 11 Mod. 261: pl. 17. Mich. 8 Ann. B. R. The Queen v. Dr. Wall.

6. Parish clerk nominated by the parson is, by common law, an officer, and in *for life*, without deed. 2 Salk. 536. pl. 27. Hill. 10 Ann. B. R. Parish of Gatton v. Milwick.

For more of Clerk of the Parish in general, see *Prohibition*, and other proper titles.

Clerk of the Peace.

(A) His Office. And appointed, and discharged by whom, and for what

1. 37 H. 8. cap. *EVERY* custos rotulorum shall appoint the clerk 1. f. 3. of the peace, and grant the office to such able person instructed in the laws as shall be able to exercise the same, to hold the same during the time that the custos rotulorum shall exercise the office of custos rotulorum, so that the said clerk demean himself in the office justly; and it shall be lawful to such grantee of the said clerkship to occupy the office by himself, or by his deputy instructed in the laws, so that the deputy be admitted by the custos rotulorum.

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2. The clerk of the peace is amerciable by the court of king's bench for gross faults in indictments drawn up by him, and removed thither, and it hath often been so done (21 Car. 1. B. R.), for such faults shall be intended to be faults committed out of negligence, and not out of ignorance. L. P. R. 71.

3. 1 W. & M. stat. 1. cap. 21. f. 5. The custos rotulorum, or other person to whom it shall belong to appoint the clerk of the peace, shall, where the office of clerk of the peace shall be void, nominate a sufficient person residing in the county or place, to exercise the same, by himself, or his sufficient deputy, for so long time as such clerk of the peace shall well demean himself in his office.

4. 8. 6. If any clerk of the peace shall misdemean himself in the office, and a complaint in writing of such misdemeanor shall be exhibited to the quarter sessions, it shall be lawful for the justices, upon examination

waition and proof, to suspend or discharge him from the office, and the *custos rotulorum*, or other person to whom it shall belong, shall appoint another sufficient person residing in the county, &c. to be clerk of the peace, and in case of neglect to make such appointment before the next quarter sessions, it shall be lawful for the justices to appoint one.

5. The clerk of the peace must make out all process, and when they are completed must deliver them to the *custos*, but as long as they are in process they are to be with the clerk, but for refusing to deliver the rolls to the *custos*, he was indicted and removed, and a mandamus to restore him was denied per 3 justices against the Ch. J. 4 Mod. 31. Pasch. 3 W. & M. in B. R. The King and Queen v. Evans.

Show. 28a. Mich. 3 W. & M. the S. C. it was objected, that there were no articles or complaint in writing

against him according to the statute of 1 W. & M. and Holt Ch. J. declared, that the justices cannot discharge a clerk of the peace for a fault appearing in court without articles in writing; and afterwards, for want of a writing, a peremptory mandamus was granted.—12 Mod. 13. S. C. it was argued, that the statute 1 W. & M. vests a freehold in the clerk, *quamdiu se bene gesserit*, and per Holt Ch. J. the clerk of the peace is a distinct officer, and not a mere servant, and a peremptory mandamus was granted. — He draws up the *issues upon traverses*; per Gregory J. Show. 523. Trin. 5 W. & M. in case of *Harcourt v. Fox*. — He must be trusted with the rolls to make entries upon, and draw judgments, and is to record pleas, and join issues, and enter judgments; per Holt Ch. J. Show. 350. in S. C. — S. C. cited *Ld. Raym. Rep.* 161.

6. In *indebitatus assumpsit*, and non-assumpsit pleaded, the jury found the stat. 27 H. 8. and 1 W. & M. and the several clauses in them about clerk of the peace; that the Earl of Clare was *custos rotulorum* of Middlesex, and that he named the plaintiff to be clerk of the peace, to exercise the office by him or his sufficient deputy, *quamdiu se bene gesserit*; that the plaintiff was capable of the office, and duly admitted; that the Earl of Clare was afterwards removed, and Earl of Bedford made *custos rotulorum*, who constituted, by writing under hand and seal, the defendant, during the time he was *custos rotulorum*, *quamdiu* the defendant *se bene gesserit*; and on solemn argument judgment pro quer' per tot. Cur. for that he had estate for life, and was not removeable by the new *custos*. 12 Mod. 42. Trin. 5 W. & M. *Harcourt v. Fox*.

4 Mod. 167 to 175. S. C. and per Cur. the clerk of the peace being in this office by virtue of this act, for so long time as he shall demean himself well, those words shall be construed most favourably to answer the

intent of the law-makers, whose design was to have the office well supplied by a man able and well skilled in the laws, which will be effected when the officer hath an estate for life; and for these reasons judgment was given in Trinity term following for the plaintiff, and afterwards affirmed in parliament. — Comb. 209. S. C. adjudged for the plaintiff. And Holt Ch. J. added, that it was the general temper of the then parliament, to make offices more lasting (and said that our places are so) and *contemporanea expositio est optima*. — Show. 426 to 441 and 506 to 516. S. C. argued by counsel. — Ibid. 516 to 537. S. C. the opinions of the judges delivered for the plaintiff. — Show. Parl. Cases, 158. S. C. in the house of lords, and judgment affirmed.

* [543]

7. By the statute 1 W. & M. the *custos rotulorum* is to appoint a clerk of the peace for so long time only as he shall demean himself well. Owen brought a mandamus to the justices to restore him to that office. The return was, that the Earl of Winchelsea, who was *custos rotulorum*, * did appoint O. to be clerk of the peace *durante beneplacito*, &c. that the said earl being dead, the Lord Sydney was made *custos*, who appointed S. to be clerk of the peace of Kent, pursuant to the said act. The question was, whether a grant of this office during pleasure, which is only an estate at will, shall

Cumb. 317. S. C. and adjudged a good return; for the statute gives the *custos* a particular power to appoint the person, continuance,

an manner of holding the office, and the word (only) in the act excludes the power to name in any other manner, and therefore the appointment during pleasure being less than his authority, and not warranted by it,

be so governed by the statute as to make it an estate for life when once the person is admitted to the office, so that let the custos make what appointment he will, though not pursuant to the statute, it is the statute, and not the custos, which gives an interest and estate to the nominee? Adjudged, that no peremptory mandamus should go; for, by the act, the custos is to nominate a clerk to execute the office so long as he shall demean himself well, &c. and if he appoint him in any other manner, he is no clerk of the peace, so that appointment during pleasure is not pursuant to the act; for he has not executed the authority given him by the act, and so the defendant has no title. 4 Mod. 293. Trin. 6 W. & M. in B. R. The King v. Owen.

is void.——S. C. cited as resolved accordingly in B. R. Pasch. 7 W. 3. after several arguments. Ld. Raym. Rep. 160.

After the act of 1 W. & M. 21. the custos rotularum of the county of Kent, in open sessions then held for that county, at which time J. S. was

present in court, said, I do nominate the said J. S. to be clerk of the peace according to the said act of parliament; and this in C. B. was held good, though only by parol, and in error in B. R. a parol appointment was held good, but the judgment was reversed for the insufficiency and infirmity of the words, but that judgment was reversed in the house of lords. Carth. 426. S. C.——12 Mod. 199. S. C. and the reversal reversed accordingly.——Ld. Raym. Rep. 158 to 167. S. C. and the reversal reversed accordingly.

8. It always belonged to the *custos rotularum* to nominate the clerk of the peace, but the clerk of the peace was *removeable* whenever the custos was removed or changed, and, moreover, was removeable at the will of the custos till 37 H. 8. 1. which makes him to continue in quosque the custos shall continue in, but now, by the late act, he is to continue for life, and though the words are, give and grant to him, yet it is only an appointment, and consequently may be *without deed*. 2 Salk. 467. Trin. 10 W. 3. B. R. Sanders v. Owen.

9. He is no more than a *ministerial officer*, and a record made by him is not to be pleaded as a *record*, and will not conclude the judgment of B. R. Arg. 8 Mod. 43. Pasch. 7 Geo. 1. in case of Colvin v. Fletcher.

Client and Attorney.

(A) Disputes between them as to Deeds, &c. in the Hands of the Attorney.

1. **A** Ttorney being to draw a deed has writings brought to him, and amongst them is one that concerns himself and his title; * though the *deed concerned the attorney's own title, yet* the court forced him to *deliver it up*, and left him to take his proper remedy at law. 2 Show. 165. pl. 156. Mich. 33 Car. 2. B. R. Tyack's case.

* [544]
But where they come to him in any other manner, or on any other account, the party must resort to his

action. 1 Salk. 87. pl. 5. Mich. 10 W. 3. B. R. Goring v. Bishop.

2. Attorney having *money due to him from his client*, shall not be compelled to deliver up the papers before he is paid his fees, &c. Comb. 43. Hill. 2 & 3 Jac. 2. B. R. Anon.

S. P. unless the party agrees to pay his reasonable demands.

12 Mod. 554. Trin. 13 W. 3. Anon.

3. An attorney having writings delivered to him to draw a mortgage, &c. may *detain them till the money is paid for his drawing them*; but he cannot detain any writings, which are *delivered to him on a special trust*, for the money due to him in that very business; and if he does, an *attachment* will go, and he will be ordered to pay *costs and damages* to the party. 8 Mod. 306. Mich. 11 Geo. 1. Lawton v. Dickenson.

8 Mod. 339. says the court has gone so far as to compel a counsel to deliver up the writings intrusted with him.

4. Client delivered a deed to his attorney, in order to bring an action of covenant. The *attorney lost the deed*, as he pretended. On a *motion for an attachment* against the attorney for not delivering the deed, it was proposed by Mr. Strange, the attorney's counsel, that the plaintiff should bring a bill of discovery to make him set out whether there was not such deed, and what the deed was; but he agreed that it ought to be at the attorney's costs, and moved that the court would not grant an attachment. Page J. said he thought the attorney himself ought to procure a discovery by bill in chancery, but that the plaintiff should allow him to make use of his name for that purpose; accordingly the court granted an attachment, but to lie in the officer's hands till further directions given. 2 Barnard. Rep. in B. R. Pasch. 6 Geo. 2. Court v. Gilbert.

(B) Other Matters in general, as to Client and Attorney.

Mo. 366.
pl. 500.
S. C. 2d-
Judged.

1. **H**E may *expend money as attorney, but not as solicitor*; per Pop-
ham, Clench, and Gawdy. Cro. E. 459. pl. 4. Hill.
38 Eliz. B. R. Rolls v. Germin.

2. If the client in any suit furnishes his attorney with a *plea*,
which the attorney finds to be *false*, so that he cannot plead it for
fate of his conscience, the *attorney may plead* in this case *quod non*
fuit veraciter informatus, and in so doing he does his duty. Jenk.
52. pl. 100.

If an attor-
ney confess
judgment,
the party is
bound by it.
Arg. Chan.
Cases, 86, 87. Pasch. 19 Car. 2.

3. If an attorney *confesses the action without consent and will of his*
client, this shall bind the client; but otherwise it is in *collateral*
matters; per 2 justices. 2 Roll. Rep. 63. Hill, 16 Jac.
B. R.

4. An attorney may take fees, but he may not lay out or *expend*
money for his client; and if he does, Hobart doubted what remedy
he might have. Winch. 53. Mich. 20 Jac. C. B. Gage v. John-
son, cites Sam. Leech's case.

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5. A client brought *action sur le case against his attorney* for de-
livering to the sheriff a *fi. fa.* against him in a suit in which he
was attorney for him, and procuring it to be executed. It was
insisted after verdict, that the suit was determined by judgment
being given, and consequently the trust reposed in the defendant.
Adjudged the trust still continued; for the defendant might have
shewed cause why there should not be execution; and his pro-
curing the writ to be executed, shews that he *combined against*
his client; and judgment for the plaintiff, nisi. Sty. 426. Mich.
1654. B. R. Lawrence v. Harrison.

6. It was said and admitted that an attorney's *assent to an award*
shall bind his client. Ch. Cases, 87. Pasch. 19 Car. 2. in case of
Colwell v. Child.

7. *Money recovered, paid to the attorney* on record, is good pay-
ment; for it is a payment to the client himself. 2 Show. 139.
Mich. 32 Car. 2. . . . v. Morton.

8. Bill by administrator for relief, after a *special plene adm.*
pleaded, and verdict and judgment, pretending that his attorney
without direction pleaded that the defendant (now the plaintiff)
had no notice of the original till the 12th of March, and had
then fully administered. Issue was that the defendant had notice
before the 12th, viz. on the 6th of March; whereas he had in
truth fully administered before the 6th of March, and in truth
before the original purchased; so that *by the false plea by the at-*
torney the right was never tried. The master of the rolls dismissed
the bill, and Ld. Somers affirmed the dismissal. 2 Vern. 325.
pl. 314. Mich. 1695. Stephenson v. Wilson.

9. In

9. In assumpsit the defendant pleaded non-assumpsit *infra sex annos*. The plaintiff replied; and the defendant not joining issue in due time, the plaintiff's attorney signed judgment, but afterwards consented to accept the issue; but upon a motion to compel him to accept the issue, it was opposed, because the plea was a hard plea, and the client having notice of this advantage, ordered his attorney to insist upon it; and the court said they would not have held him to it, had he not consented; but now they would, and the client is bound by the attorney's consent, and they could take no notice of him. 1 Salk. 86. Mich. 8 W. 3. B. R. Latouch v. Pasherant.

10. An attorney *may undertake for his client, but not release his cause of action*; per Holt Ch. J. 12 Mod. 384. Pasch. 12 W. 3. in case of Stanhope v. Pemberton.

11. Action against an attorney for *money received to plaintiff's use*; the attorney *shewed to the court that he had been employed as an attorney for the plaintiff, and had applied some of his money towards paying for his labour, and some to a solicitor in the cause*; and moved to have his bill taxed, and an allowance of what should then appear due to him. Per Cur. if the plaintiff had applied by *motion* to have us compel an attorney by virtue of our power over him as our officer, to pay the money, there, for as much as that is discretionary in us, we would not help the plaintiff, unless he did the fair thing on his side; but here, when he demands no favour of us, we cannot deny him the law, and let the defendant take his legal remedy against the plaintiff. 12 Mod. 657. Hill. 13 W. 3. Craddock v. Glin.

12. As an attorney has a privilege not to be examined as to the secrets of his client's cause, so the *attorney's privilege is the client's privilege*; and an attorney, though he would, yet shall not be allowed to discover his client's secrets; per Cur. 10 Mod. 41. Mich. 10 Ann. B. R. in the case of Ld. Say and Seal;—and cites it as so adjudged in Holbeche's case.

13. *But as to the time of executing a deed, which was of a date long before the execution, that is not a thing of such a nature as to be called the secret of his client.* 10 Mod. 41. Mich. 10 Ann. [546] B. R. The Ld. Say and Seal's case.

For more of Client and Attorney in general, see *Attorney*, and other proper titles.

Collateral.

(A) What shall be said Collateral. And the Effect thereof.

1. **A**S to collateral acts there shall be *no relation* at all. Resolved. 3 Rep. 36. Mich. 33 & 34 Eliz. B. R. in case of *Butler v. Baker*.

2. Privilege to be *without impeachment of waste* is a thing collateral. 2 Rep. 82. Hill. 43 Eliz. Per Coke in *Cromwell's case*.

But Coke thinks *audita querela* lies, because the ground of the collateral action is disproved and destroyed by reversal of the

first judgment, and the first plaintiff is restored to his first action, on which he may have his just and due remedy. Ibid. 143. b. 144.

A covenant is more collateral than a condition; for a condition is annexed to the estate, but covenants are foreign. Arg. Show. 286. Mich. 3 W. & M.

3. There is a difference between a thing collateral *executory* and *executed*; as by reversal of an erroneous judgment collateral acts executory are barred, so on reversal of a judgment escape out of execution on that judgment is gone; but if judgment is had on the escape, against the sheriff or gaoler, and execution is executed, this latter judgment remains in force, notwithstanding the reversal of the first judgment. Resolved. 8 Rep. 142. a. b. Pasch. 8 Jac. in *Dr. Drury's case*.

4. A condition is collateral without dependence on the estate. Arg. Keb. 31. Pasch. 13 Car. 2. B. R. in case of *Plunket v. Holmes*.

(B) Collateral Promise. The Effect thereof.

Br. Dette, pl. 36. cites S. C.

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1. **I**N debt the plaintiff counted that *A. borrowed of him 100 l. and did not pay it, by which the defendant came to the plaintiff and prayed him to take him debtor for A. and to give him till Michaelmas to pay it, and so became principal debtor at London, and shewed thereof tally; and because he had not specialty, he took nothing by his writ; quod nota; for per Mowbray, by this assumption the other is not thoroughly discharged, and by consequence this defendant is not debtor, but the other remains debtor as before; and also see that it is only nudum pactum. And so see that a becoming debtor, which is used in London by custom, is not good at common law. Br. Dette, pl. 36. cites 44 E. 3. 21.*

2. 29

2. 29 Car. 2. cap. 3. §. 4. *No action shall be brought, whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt or default of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him authorized.*

This statute did not extend to any promise made before the 24th of June. Resolved.

Vent. 330, 331. Trin. 30 Car. 2.

B. R. *Gilmore v. Shuter*.——2 Jo. 188. S. C. adjudged accordingly.——2 Lev. 227. S. C. resolved accordingly.——2 Mod. 310. S. C. adjudged accordingly.——Freem. Rep. 466. pl. 637. S. C. held accordingly.

Assumpsit upon a promissory note, whereby the defendant promised to pay so much upon account of his mother; and it being objected that there was no consideration to it, Holt said, that to promise to pay to J. S. is good, but to promise to pay to J. S. upon account of J. N. is not good, for that is not within the words or meaning of the act; the consideration implied in the act is, that when the party promises upon his own account, it must be presumed he is indebted, or else he would not promise to pay it; aliter where the promise is to pay upon account of a third person. In this case Holt directed a verdict for the plaintiff, but under controul, and ordered the posita to be paid. 11 Mod. 226. Pasch. 3 Ann. at Guildhall. *Garnet v. Clerke*.

Clearly the words (*default of another*) in the statute, is the default of another in performing his contract, and if the whole credit be not entirely given to the undertaker, so as no remedy lies against the party upon the contract, but that the undertaker comes in aid of the credit given by the contract to the party, the undertaking will be within the statute; per Cur. 6 Mod. 249. Mich. 3 Ann. B. R. *Bourkamire v. Darnell*.——And they also agreed a case put by Darnell, that *where the plaintiff has an action against the party for whom the undertaking is*, there no action will lie against the undertaker, without the promise be in writing; *scilicet* where no action does lie against the party, for then the whole credit is entirely upon account of the undertaker, and the other looked upon as his servant, and the sale and contract is, in judgment of law, to the undertaker, though the delivery be to the other party as his servant. Ibid.

3. An indebitatus assumpsit, or a special assumpsit, though it be on a special promise to pay another man's debt, and though it be collateral, and within the statute of frauds and perjuries, yet the not alleging a note in writing in the declaration is not error to reverse a judgment; for the court will intend that a note was given in evidence; yet many, since that act, do declare that *assumpsit super se, prout per notam*, &c. but it is not necessary; and judgment affirmed. 2 Show. 88. pl. 81. Hill. 31 & 32 Car. 2. B. R. *Calcot v. Hatton*.

4. If I build a house for J. S. at the request of J. N. and J. N. promises to pay me, debt will lie; it is true it will not raise a promise, but an express promise will well ground an action. 2 Show. 421. Hill. 36 & 37 Car. 2. B. R. in case of *Ambrose v. Rowe*.

5. In assumpsit for the debt of a stranger, it was assigned for error that it did not appear to be by writing, and consequently by the statute of frauds and perjuries it does not bind the defendant; but per Cur. this is never done in pleading, but ought to be proved on the trial. Comb. 163. Mich. 1 W. & M. in B. R. *Lee v. Bashpoole*.

6. A. brought an action against B. C. and D.—B. promised that in consideration A. would not prosecute the action, he would pay him 10 l. and the question was, whether this was a void promise by the statute, not being in writing? But per Cur. this cannot be said to be a promise for another person, but for his own debt, and therefore not within this statute. 5 Mod. 205; Pasch. 8 W. 3. *Stephens v. Squire*.

Comb. 362. S. C. accordingly.

7. Assumpsit

3 Salk. 14,
15. S. C.
adjudged,
and affirmed
accordingly.
— 12 Mod.
133. S. C.
adjudged,
and judg-
ment affirm-
ed accord-
ingly.

7. Assumpsit in consideration that the plaintiff *would accept C. to be his debtor* for 20 l. due from A. to B. The plaintiff in *vice et loco A.* that C. would pay. B. averred that he did accept C. to be his debtor, &c. Adjudged good after a verdict, without express averment that ** A. was discharged*; and judgment affirmed by 4 judges against 3, and they construed it to be a mutual promise. 1 Salk. 29. pl. 30. Pasch. 9 W. 3. in Cam. Scacc. Roe v. Haugh.

8. If *A. employs B. to work for C. without warrant from C.* A. is liable to pay for it; per Holt. 12 Mod. 256. Mich. 10 W. 3. Anon.

9. Assumpsit against B. upon a promise supposed to be made by him to pay for goods delivered by plaintiff to A. Holt took this difference: If B. desires A. to deliver goods to C. and promises to see him paid; there assumpsit lies against B. though in that case he said, at Guild-hall, he always required the tradesman to produce his books, to see whom credit was given to. But if after goods delivered to C. by A., B. says to A. you shall be paid for the goods, it will be hard to saddle him with the debt. 12 Mod. 250. Mich. 10 W. 3. Austen v. Baker.

10. Two persons go to an inn-keeper, *one hires an horse, and the other promises that if the inn-keeper will deliver him to his friend, he will see it forth-coming.* This, as a promise to make good the default of another, is not good without a note in writing; yet the defendant is chargeable upon the *special bailment.* Quod nota, and so good without a note. L. P. R. 118. cites 3 Ann. B. R.

6 Mod. 248.
Bourkamire
v. Darnell,
S. C. & S. P.
— 3 Salk.
15, 16. S. C.
and same di-
versity, and
that in the
last case the

third person is only as a servant.

11. Where the *undertaker comes in aid only* to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements, and this is a collateral promise, and void by the statute of frauds; *saw where the whole credit is given to the defendant.* 1 Salk. 27. pl. 15. Mich. 3 Ann. B. R. in case of Birkmyr v. Darnell.

6 Mod. 248.
Bourkamire
v. Darnell,
S. C. & S. P.
accordingly.

12. If 2 come to a shop and 1 buys, and the other to gain him credit promises the seller, *that if he does not pay you I will*; this is a collateral undertaking and void without writing by the statute of frauds; but if he says, *let him have the goods I will be your paymaster, or I will see you paid*; this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant; per Cur. 1 Salk. 28. pl. 15. Mich. 3 Ann. B. R. in case of Birkmyr v. Darnell.

13. There is a difference between a *conditional* and an *absolute* undertaking; as if A. promises to pay B. such a sum if C. does not, there A. is but a security for C. But if A. promise that C. will pay such a sum, A. is the principal debtor; for this act was done on A.'s credit, and not on C.'s; per Lee J. and judgment accordingly. Gibb. 303. pl. 7. Trin. 5 Geo. 2. B. R. Gordon v. Martin.

(C) Collateral Security.

1. **A.** Having purchased lands of the Duke of Norfolk, had for his security *future use limited on condition of eviction* of the purchased lands to arise to him out of other lands of the duke within the honour of Clun in Shropshire; after which the duke was attainted, and *lands of the honour came to the crown*, and then the purchased lands were evicted, and adjudged that A. could have no remedy by entry, ouster le maine, monstenance de droit, &c. because before the future use accrued, the possession of the land came to the crown, and therefore A. sued to the Queen, who de gratia granted the land to him by patent; Arg. Mo. 375. cites it as Yelverton's case.

S. C. cited and admitted. Ibid. 389.

2. *Trustees for sale* of lands for payment of debts, *with power on sale to give collateral security* on other lands to a purchaser for discharge of incumbrances, and confirmation by the heir, when of age, fell to J. S. and give him collateral security. The heir comes of age, and *refuses to confirm*, he pretending other title, but could not make it out. Decreed that trustees sell other lands to discharge incumbrances on the lands purchased by J. S. and the heir to join; and in default by the trustees, J. S. to tender a purchaser to the master, and the heir to join in the conveyance, and also immediately to confirm the lands to J. S. with warranty and covenants according to the condition of the collateral security; and that J. S. may proceed to get judgment in ejectment on his collateral security, with a cesset executio till further order. Fin. R. 166. Mich. 26 Car. 2. Foley v. Lingen.

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2 Cl. an.
Cases, 205.
S. C. but not exactly S. P.

3. *Covenant to secure a purchaser by other lands* within 2 years. The next term after the 2 years expired the purchaser exhibits his bill to have collateral security according to the covenant. Ld. Keeper dismissed the bill, and took a difference between covenants for further assurance of the lands sold, and collateral security of other lands to incumber the estate; and the 2 years being elapsed, dismissed the bill. Chan. Cases, 252. Hill. 26 & 27 Car. 2. Erwick v. Bond.

Fin. R. 192.
Bond v. Eversfield,
S. C. but no decree. But the defendant might search for precedents, whether the court can

enlarge the time for giving collateral security.

4. **A. sells land to B.** A. takes a lease of the same lands of B. at a rent beyond the value, with a condition of *re-entry*, and gives collateral security for the *payment of the rent*. A. was arrear 5 years rent. B. re-entered. A. could have no *relief* against the collateral security without payment of the arrears as well after as before the re-entry; the land was worth but 160 l. but the rent was 250 l. per ann. Chan. Cases, 261. Trin. 27 Car. 2. Anon.

5. *Assignment of a decree* is a collateral supplementary security; and so Finch C. dismissed the bill brought by the plaintiff to have a release of the decree made by the assignor set aside. Chan. Cases, 300. Mich. 29 Car. 2. Barns v. Canning and Pigot.

For more of Collateral in general, see **Conditions** (S. c) (E. d) (F. d), **Heir, Voucher** (U. b. 2) to (W. b), and other proper titles

Collation.

(A) What is. In what Cases it may be. And the Effect thereof.

1. **I**T was said, that where the *bishop* ought to make collation, and is *disturbed*, his writ shall be to present, and his count to make collation. Thel. Dig. 84. lib. 9. cap. 5. f. 20. cites Mich. 16 E. 3. Brief, 660.

[550] 2. Collation by lapse is in the right of the patron and for his turn. 24 E. 3. 26. And he shall lay it as his possession for an assise of daren presentment. Hob. 154. in case of Colt v. Glover, and cites 5 H. 7. 43. F. N. B. 31. (F).
Hob. 316. in case of Elvis v. Archbishop of York & al'. — 3 Le. 18. pl. 44. Hill. 14 Eliz. C. B. Anon. S. P. — 4 Le. 209. pl. 339. Mich. 18 Eliz. B. R. Anon. S. P. and seems to be same S. C. — Collation shall not put a common person out of possession. Cro. E. 241. pl. 14. Trin. 33 Eliz. B. R. in case of the Archbishop of York v. Buck.

3. Note, that there is *no privity* between the incumbent of the bishop who is collated by lapse, and the bishop, as there is between the master and servant, and therefore if the *bishop* pleads specially in quare impedit how he presented by lapse, the incumbent shall not say generally that he is in by collation of the bishop by lapse, but shall plead it as certainly as the *bishop* shall plead. Br. Incumbent, &c. pl. 12. cites 16 H. 7. 6.

4. If a patron presents after 6 months before a collation, the ordinary must admit his clerk as well as within the 6 months, so that the ordinary must plead that he made collation such a day after the 6 months, absque hoc that the plaintiff presented before this day, and this was held a good traverse; per tot. Cur. Kelw. 50. b. Trin. 18 H. 7.

5. Collation is where the clerk is inducted without presentation to the bishop, as of lapse by the bishop, or of *donative* of a free chapel, &c. where he himself may put the clerk in corporal possession without presentation. Br. Quare Impedit, pl. 156. cites F. N. B. 32, 33.

Collation is a giving the church to the parson, and presentation is a giving or offering the parson to the church, and that makes a *plurarty*, but not a collation; per Cur. Le. 226. pl. 307. Patch. 33 Eliz. C. B. in case of the Queen v. the Archbishop of York.

6. Bishop collates after lapse is devolved on the archbishop, but before collation by the archbishop. This shall bind the archbishop; for,

for, at common law, when a clerk was once admitted, he was not removeable, and *collation remains at common law*. The stat. W. 2. does not aid but in case of presentation. Jenk. 281. pl. 7.

7. Collation of the bishop makes no *disappendancy*, and where it is made *within 6 months* it makes not so much as a plenarty, but the church remains void, as Green's case saith, that is, that it makes no binding plenarty against the true patron, but that he may not only bring his quare impedit when he will, but also *present* upon him seven years after; and if the bishop receives his clerk, the other is out ipso facto, yet to all other he is a full incumbent (and not in nature of a curate only), and shall sue for tithes, and is capable of confirmation from the king; and per Hobart Ch. J. if the patron brought quare impedit on it, he must be named, or else could not be removed, and that such a *plenarty* barred the lapse of the archbishop and king. Hob. 302. pl. 380. Hill. 17 Jac. in case of Gawdy v. Archbishop of Canterbury.

8. *If the king presents by lapse, it is not any collation, but a presentation, and so pleaded always, for he presents as supreme patron; per Cur. Cro. J. 641. pl. 20. Mich. 20 Jac. B. R. cites 32 H. 6. 2. and 7 E. 4. 20.*

9. *If a bishop collates the same day that he dies, the successor may collate notwithstanding. Arg. Hard. 24. Mich. 1655.*

10. This had been moved the two preceding seals, and was now moved again. The case was, that the defendant Sir Walter C. & al' were trustees of an advowson by *settlement, upon trust, to present such person as the heir of J. S. should, by writing under hand and seal, nominate, and in default of such nomination, to present in their own right as they should think.* The church becomes void, and the heir of J. S. is an infant of about 9 months old; the trustees contend that the infant is not capable of nominating by writing, &c. and that therefore they have right to present proprio jure, &c. Bill was brought by the infant to compel the trustees to present according to his nomination, &c. Injunction was granted as to defendants, to restrain them from presenting without leave of the court, and *an order that the archbishop of York (the ordinary), should not admit, &c.* And the question now was, whether this order would prevent the archbishop from collating when the 6 months for presenting expired, or that there should be a particular order to restrain the archbishop from collating, &c.? And after a good deal of debate it was agreed by ld. chancellor, & omnes, *that the order to prevent admission was sufficient to prevent collation, because collation was admission, institution, and every thing but induction; and at law, upon a quare impedit and ne admittas, the ordinary cannot collate or take advantage, and this order is in its nature an English ne admittas, and as to the question, whether the bishop in this case could take advantage of lapse or not, Ld. Chancellor held clearly that he could not; for as at law lapse was prevented by a ne admittas, so when the title is in equity, the bishop is equally restrained and prevented of lapse, by an order not to admit, pending the dispute*

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dispute in this court, and this was observed to have happened several times before, in the case of mortgagor and mortgagee, where the mortgagee having the legal title pretended to present, whereas in equity the presentation (or the right of nomination) belongs to the mortgagor. As to the main point, Ld. Chancellor seemed strongly to incline, that the nomination by the infant was good; for by law infants, of never so tender age, are to present, and theirs, and all other presentations, are usually in writing; and cannot be otherwise when the infant cannot speak, &c. But a difference was endeavoured to be put, that here was a particular method prescribed by the trust, viz. by writing under hand and seal, &c. which must suppose the person, who created the trust, did intend the heir to nominate, and should exercise a discretion, and be capable of knowing as well as executing a writing, &c. MS. Rep. Mich. 4 Geo. 2. in Canc. *Arthington v. Sir Walter Covertly & al.*

For more of Collation in general, see *Presentation*, and other proper titles.

Colleges.

(A) How considered, &c.

* [552]

Dal. 31.
pl. 13. 3
Eliz. S. C.
in totidem
verbis, and
cites 13 H. 8.
13. the like
point.

S. C. cited
2 Lev. 15.
Arg.—
Mod. 83.
S. P. Arg.
in Apple-

ford's case.——He cannot maintain assise in any case whatsoever, for he has no sole, seisin, nor estate to support a real action, he is only a visible person of the body aggregate, but has not the least title to the rents and profits of the college, till after a dividend made; per Holt Ch. J. 4 Mod. 125. Trin. 4 W. & M. in B. R. in case of Phillips v. Bury.——S. P. by Holt Ch. J. Skinn. 488. in S. C. † D. 209. a. pl. 20. Mich. 3 & 4 Eliz. at the end of Coveney's case.——S. C. cited and questioned. Show. Parl. Cases, 47. in case of Phillips v. Bury.

1. *Devise to a college by the president thereof is void; for when the devise should take effect, the college is without a head, and so not capable of such devise, for it was then an imperfect body; held per Cur. on good advice taken thereof.* 4 Le. 223. pl. 358. Temps * Queen Eliz. B. R. in the case of the President of Corpus Christi College in Oxford.

2. It was agreed, if the *master of the college be ousted wrongfully* an assise will lie, as it was said in the end of † Canon's case D. but not if he be ousted by his proper ordinary or visitor. Lev. 23. Pasch. 13 Car. 2. B. R. in Doctor Widdrington's case.

Colleges.

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3. Colleges are not spiritual foundations, but are private societies, as inns of court. 2 Lev. 15. Trin. 23 Car. 2. B. R. The King v. New College. S. P. by Hale Ch. J. Mod. 84. Mich. 22 Car. 2.

B. R. in Appleford's case.—A college is a lay corporation; if they be dissolved, an assise must be brought. Godb. 394. pl. 478. by Noy, Arg. Pasch. 3 Car. B. R.

4. Fellows of fellowships newly created cannot pretend to have any shares of the annual profits, or the casual revenues which did belong to the fellows of the old foundation, though they may be capable of all offices and employments in the college, if not hindered by the local statutes. Fin. R. 222. Trin. 27 Car. 2. in case of St. John's College, Cambridge v. Platt.

For more of Colleges in general, see Estate, Grants, &c. Mandamus (B), Tutor, and other proper titles.

Colour in Pleadings.



(A) What it is. And the Reason thereof.

1. COLOUR in pleading is a feigned matter, which the defendant or tenant uses in his bar, when an action of trespass for land or goods, or an assise, or entry sur disseisin for rent, or an action upon the statute of 5 R. 2. for forcible entry is brought against him, in which he gives the plaintiff or demandant some colourable pretence, which seems at first sight to intimate that he hath good cause of defence, the intent whereof is to bring the action from the jury's giving their verdict upon it, to be determined by the judges; and therefore it always consists of matter in law, and that which may be doubtful to the lay-people. Brown's Anal. 7.

As in trespass for taking the plaintiff's cattle, the defendant saith, that before the plaintiff had any thing in them, he was possessed of them as of his own proper goods, and delivered them to T. S. to re-deliver to him again upon request, but T. S. giving them to the plaintiff, who, supposing the property was in T. S. at the time of the gift, took them, and the defendant took them from the plaintiff, and thereupon the plaintiff brought his action; this is a good colour and a good plea. Heath's Max. 27. cites Doct. & Stud. lib. 2. cap. 13. And Brooke, fol. 104. title, Colour in Assise, Trespass, &c.

* [553]

2. Note, that colour ought to be matter in law, or doubtful to the lay-gents. Br. Colour, pl. 64.

& S. P. as that it must be doubtful to them, whether the same be good in law or not.

3. Colour

Colour in Pleadings.

3. Colour signifies *a probable plea, but really false*, and hath this end, viz. *to draw the title of the cause from the jury to the judges.* Heath's Max. 26, 27.

4. Colour ought to be such a thing which is good colour of title, and yet is no title; as a deed of a lease for life, because it hath not the ceremony, viz. livery. So of reversion granted without attornment. But a deed of gift of goods or chattels is good without other act or ceremony. So of colour by a lease for years, or by letters patents, it is not good, because they make a good title in the plaintiff; and of that opinion was all the court. Cro. J. 122. pl. 6. Trin. 4 Jac. B. R. Radford v. Harbin.

5. The reason why colour shall be given in writ of entry sur disseisin, writ of entry in nature of assise, assise, trespass, &c. is that the law (which prefers and favours certainty as the mother of quiet and repose) to the intent that where the court shall adjudge upon it, if the plaintiff demurs, or that a certain issue may be taken upon a certain point, requires that the defendant, when he pleads such special plea, that the plaintiff notwithstanding may have right, the defendant shall give colour to the plaintiff, to the intent that his plea shall not amount to the general issue, and so leave all the matter at large to the jurors, which will be full of multiplicity and perplexity of matter; and though the colour be only fiction, yet *lex fingit ubi subsistit æquitas*; cites Dr. & Stud. cap. 53. fol. 160. b. But when the special matter of the plea, notwithstanding the plaintiff had right before, utterly bars him of his right, in such case the defendant need not give any colour, because he bars the plaintiff of his right if he had any, and then it will be in vain to give the plaintiff colour, where it appears upon the matter of the plea that he had no right; for by this, if in real action, as assise, writ of entry in nature of assise, &c. if collateral warranty be pleaded, and the defendant relies upon it, or if estoppel be pleaded, or fine levied with proclamations, &c. there no colour need be given, because the plaintiff is barred, though he had right; and with this accords 35 H. 6. tit. Trespass, 160. So, and for the same reason, if the defendant conveys to him title by act of parliament, as is held 3 E. 4. 2. a. b. Resolved per Cur. 10 Rep. 90. a. b. Hill. 8 Jac. in Cam. Scacc. in Dr. Leyfield's case.

6. Wheresoever the defendant shows a cause of action in the plaintiff, either express or implied, and confesses and avoids it, it is a good plea; for by confession and avoidance he confesses the plaintiff has cause of action against him, were it not for some special matter in law, by which is not meant a question in law, but a thing which in law avoids the cause of action, as a sale in market overt; and without leaving a cause of action, it will amount to the general issue, and this is the reason of colour. 12 Mod. 121. Pasch. 9 W. 3. Hallet v. Birt.

(B) In what Actions Colour may or must be given.

1. **I**N error it appears that the case was, *lord, mesne, and tenant by 9 s. rent, and the mesne brought assise against the lord of the 9 s. rent, and he pleaded that the mesne held the land of him by 9 s. rent as mesne, by which he took 9 s. rent of him, and of so much rent rendered as tenant, and if he demands other rent, nul tort; and this bar was awarded good upon writ of error brought thereupon, without any colour; quod nota.* Br. Colour, pl. 7. cites 50 E. 3. 18.

Br. Error, pl. 30. cites S. C.—
Heath's Max. 20. cites S. C.

2. In *trespafs* the defendant said that *J. N. his master was owner of the goods, by which he at his command took them at S. and the plaintiff would have retaken them, and he would not suffer him, judgment si actio, and no plea; for he neither confessed property nor colour in the plaintiff.* Br. Trespafs, pl. 70. cites 2 H. 4. 5.

Fitzh. Colour, pl. 47. cites S. C.—
10 Rep. 89. a. in principio, cites S. C.—
Ibid. 91. a.

S. C. cited per Cur. and admitted.—Br. Colour, pl. 6. cites S. C.

3. Note that colour in assise or action of trespass is sufferable, if it be *matter in law, and difficult to the lay-gents*; and otherwise it is not sufferable, but the party shall be drove to the general issue, nul tort, or not guilty. Br. Colour, pl. 15. cites 19 H. 6. 21.

Br. General Issue, pl. 14. cites S. C. & S. P.—
Fitzh. Colour, pl. 8. cites S. C.

& S. P.—10 Rep. 91. b. in a nota of the reporter.

4. In *trespafs* the defendant said that *J. was seised in fee of the house and 20 acres, &c. of which, &c. and died seised, and B. and C. his daughters and heirs entered, and B. of her moiety infeoffed the plaintiff, and C. died, and K. her daughter and heir entered into the other moiety, and was seised pro indiviso, and infeoffed the defendant, by which he entered and did the trespass, prout ei bene licuit, and a good plea without other colour.* Br. Colour, pl. 18. cites 19 H. 6. 46.

Br. Trespafs, pl. 132. cites S. C.—
Fitzh. Colour, pl. 6. cites S. C. accordingly.—
Heath's Max. 32. cites S. C.

that to give colour by coparceners or jointenants is good.

5. *Trespafs de clauso fracto*, and eating his grafs in D. The defendant justified in *S. absque hoc that he is guilty in D.* and no plea per Cur. without giving colour. Br. Colour, pl. 82. cites 20 H. 6. 27.

Heath's Max. 29. cites 28 H. 6. 27. and that in this case he may

[but it seems misprinted for *muß*] give colour; [and likewise (28) seems misprinted for (20)].

6. In assise if the tenant *pleads dying seised and descent to him*, he shall give colour; for the *possession is bound, but not the right*; but *where both are bound, he need not to give colour.* Br. Colour, pl. 72. (bis) cites 22 H. 6. 18.

Heath's Max. 29. cites S. C.—
If the defendant says that his fa-

ther was seised, and died seised, and the land descended to him, there he shall give colour; for he shall not bind the plaintiff. Br. Colour, pl. 53. cites 12 E. 4. 15.

S. C. cited
10 Rep. 89.
b. 90. a. in
principio.—
Where the

7. In trespass of breaking his close, he shall say that the place where, &c. at the time of the trespass was the franktenement of the defendant, without giving any colour. Br. Colour, pl. 26. cites 22 H. 6. 50. Where the defendant pleads his franktenement, he shall not give colour. Br. Colour, pl. 53. cites 22 E. 4. 15. Heath's Max. 29. cites S. C. and 22 H. 6. 50. S. P.

In trespass,
seoffment
made by the
plaintiff to
J. N. who

* 8. So where he says that it was the franktenement of J. S. and be by his command entered, &c. Br. Colour, pl. 26. cites 22 H. 6. 50.

infeoffed M. and the defendant as servant of M. entered, &c. is no plea without colour. Br. Trespass, pl. 166. cites 15 E. 4. 31. Heath's Max. 28. cites S. C.

Trespass for breaking his close. The defendant pleads that J. S. was seised of the land, and let it to J. D. and be as his servant entered, and gave no colour to the plaintiff; and for that cause the plaintiff demurred; and it was argued that when the defendant makes a special title to himself, or to any other, he ought of necessity to give colour to the plaintiff; but when he pleads a general plea, or that it is his freehold, it is otherwise; and cited 2 Ed. 4. 8. But it was argued contra, because the defendant makes no title to himself, but justifies as a servant; and cited 18 E. 4. 3. Wray said he ought to give colour, though he justifies as a servant; but moved the parties to relinquish their demurrer, and plead to issue, which they did. Cro. E. 76. pl. 35. Mich. 29 & 30 Eliz. B. R. Dinham v. Beckett.

It is no plea
in trespass to
say that the

9. So where he says that J. S. leased to him for years, or at will, per Newton. Brooke says quære inde. Ibid. plaintiff leased to W. for life, the remainder to the defendant, [and that] W. died, and be entered in his remainder; per Brian. Br. Trespass, pl. 166. cites 15 E. 4. 31. Br. Colour, pl. 27. cites S. C. & S. P. by Brian.

But it is a good plea that the plaintiff leased to the defendant for 20 years, which yet continues, &c. without colour; for there be confesses the franktenement to be in the plaintiff; per Brian, quod nota. Br. Trespass, pl. 166. cites 15 E. 4. 31. Br. Colour, pl. 27. cites S. C. for it confesses the franktenement to be in the plaintiff at the time of the trespass; per Cur.

Where the defendant dub convey from the plaintiff himself, in some case he shall give colour, and in some not; as 6 H. 7. 14. where the defendant conveys from the plaintiff for life or years, there he shall not give colour; and so is 22 H. 6. 50. Otherwise as it seems by 8 Eliz. Dyer 146. where the defendant pleads a lease for years from a stranger. Heath's Max. 28.

In trespass of
breaking his
close the 15th
of August,
the defend-

10. But where he justifies at another day, and will traverse the day in time, there he shall give colour. Brooke makes a quære of that diversity. Br. Colour, pl. 26. cites 22 H. 6. 50.

ant pleaded recovery of the same land against a stranger the 20th of October, absque hoc that he is guilty before the day of the recovery; and per Cur. this is no plea without giving colour to the plaintiff, inasmuch as the recovery is against a stranger. Br. Colour, pl. 53. cites 12 E. 4. 15.

11. Trespass upon the 5th of R. 2. The defendant said that the father of the plaintiff was seised, and infeoffed him, and the plaintiff supposing that his father died seised where he did not die seised, entered, &c. and no colour per Cur. For it is not matter in law, nor doubtful; for he destroys it himself by his own shewing; quod nota. Br. Colour, pl. 3. cites 33 H. 6. 54. And concordat 37 H. 6. 54. that in this action of trespass a man shall give colour as in other actions of trespass.

10 Rep. 89.
a. cites S. C.
and that the
50 l. was
money offer-
ed to the
image of

12. Trespass of 30 l. at D. in the county of York taken and carried away (and so see that as it seems property may be of money). The defendant intituled himself as parson, and gave colour that he delivered the money to J. N. to keep to his use, who delivered it to the plaintiff, and he retook it, and it was admitted that offering changes property,

property, and yet it was admitted that he ought to give colour; *quod nota*. Br. Colour, pl. 5. cites 34 H. 6. 10.

in the parish of the defendant, where people used to offer gold and silver, and that he took it, as lawfully he might. — Ibid. 91 a. cites S. C. and says that in that case no colour need be given; but that Moyle, towards the end of the case, said that if any one takes my goods or money, and offers them to an image, in this case I am barred against him, as of goods sold and told in fair or market, in which case no colour shall be given.

Noster Dame
in a chapel
of our Lady

13. *When matter in law is, then there is no need of colour; per Laicon, Prisot and Moyle.* Br. Trespafs, pl. 222. cites 36 H. 6. 7.

14. In trespafs, the defendant justified for goods waived by a felon, and he seized them, and did not give colour, therefore ill; *quod nota*. And yet it was said there, that * 5 E. 3. a man justified for † wreck de mere, and did not give colour, and good, and so here by the reporter; § for by this plea, the property is not denied to be in the plaintiff before the stealing; for it is sufficient colour to the plaintiff, or plea in bar to the plaintiff; but here the defendant against the opinion of the court gave colour that the plaintiff supposed the property in him before the thief took them, &c. this is no colour. Br. Colour, pl. 37. cites 39 H. 6. 2.

* 10 Rep.
91. a. says
the case
intended is
Hill. 5 E. 3.
a. † He
that justified
in trespafs
for wreck,
was com-
pelled to give
colour. Br.
Colour, pl.
31. cites 9

E. 4. 22. — Trespafs of goods taken, viz. 2 butts of wine; the defendant pleaded that he is lord of the manor of D. and prescribed to have wreck within the said manor, and said that the same butts were in a ship in the high f a, which ship was drowned, and that by the reflowing of the sea, the butts were cast upon his manor, and he took them as wreck, &c. and the defendant was compelled to give colour, and so he did. Br. Prescription, pl. 32. cites 9 E. 4. 22. — Br. Colour, pl. 37. at the end cites S. G. accordingly. — 10 Rep. 90. b. cites S. C. accordingly, but says it is held in 21 E. 4. 18. b. & 21 E. 4. 65. a. that in such case no colour shall be given, and that the reason of all the other books agree herewith. So when the matter of the plea bars the right of the plaintiff, no colour shall be given. — 10 Rep. 91. a. cites S. C. and says that as to the case of waif, when the defendant alleged that the property was in the plaintiff, &c. it was resolved that no colour should be given.

In trover of 6 oxen in London, and there converted, &c. the defendant pleaded that he seized them in the manor of D. in Essex, as goods waived there, and so justified absque hoc, that he was guilty in London. Per Cur. This is no plea; for it amounts only to the general issue, containing no matter local to make the place material. Cro. E. 174. pl. 5. Hill. 32 Eliz. B. R. Bullock v. Smith.

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15. In trespafs the place is an acre, of which J. S. was seized in fee before the trespafs, and leased to W. N. for 10 years, and he as servant of W. N. and by his command entered and did the trespafs, and no plea without giving colour to the plaintiff. Contra, where he says that the place is the franktenement of W. N. and he as servant, &c. entered and did the trespafs. Br. Colour, pl. 48. cites 2 E. 4. 5.

16. In ravishment of ward, it was agreed that where the defendant intitles himself to the ward by a stranger, there he shall give colour. Br. Colour, pl. 50. cites 2 E. 4. 27.

Heath's
Max. 27.
cites S. C.

17. In trespafs upon 5 R. 2. it was admitted that colour shall be given in this action as in trespafs, and the defendant may plead not guilty, and so to issue. Br. Actions sur le Statute, pl. 29. cites 3 E. 4. 1.

18. In trespafs upon the said statute it was admitted that colour shall be given in this action, but the defendant pleaded that king H. 6. by act of parliament gave it to the predecessor of the defendant, by which he was seized, and after he resigned, and after this the defendant was elected master of the college, upon whom the plaintiff entered, upon whom the defendant re-entered, &c. and per Danby Ch. J.

Colour shall
be given in
writ of fur-
cible entry.
Heath's
Max. 27, 28.
cites Br.
Forcible En-

arg. pl. 5.
and Colour,
pl. 23. 21
H. 6. 39.
and says,

and Arden J. the defendant need not give colour; for an act of parliament binds every man, and after the parties accorded by arbitrement. Br. Colour, pl. 51. cites 3 E. 4. 2.

that so is 35 [33] H. 6. 54. and other books, that colour may be given in an *action upon the statute of 5 R. 2.* and in no other writs or actions as I can find, nor in these neither, as the pleading may be, as if the defendant *pleads the general issue*; and does not justify; or *pleads some plea that merely determines the right*; as a feoffment with warranty, fine, recovery, and the like, as appears in Brook, 14 Affise.

19. In trespass upon the 5 R. 2. it is a good plea, *that R. was seised till by the plaintiff disseised, and the defendant entered as his servant, &c.* and this without colour; because it seems that *entry after disseisin binds the mesne acts.* Br. Colour, pl. 74. cites 11 E. 4. 5.

[557] 20. Trespass by W. P. & R. against J. N. The defendant said *that W. P. the plaintiff was seised, and infeoffed T. who infeoffed M. and that the defendant as servant to M. entered and did the trespass,* and no plea, per Cur. because he did not give colour. Farf. said the writ is brought by two, and the defendant pleads the feoffment of the one, &c. and after Pigot passed over and *gave colour by the defendant.* Per Brian, then you need not speak of the feoffment of the plaintiff; for *you shall not give colour but by him by whom you commence your title*; and after Pigot said *that the plaintiff was seised as above, &c. and infeoffed, as above, &c. and the plaintiff claiming in by colour of a lease made to them for term of life, where nothing passed, &c. entered, upon whom the defendant at the time of the trespass, as servant of the feoffee, entered*; and this was held a good plea, notwithstanding that he gave colour by the defendant himself. Quod nota, quia mirum. Br. Colour, pl. 27. cites 15 E. 4. 31.

Heath's
Max. 29.
cites S. C.
— A. brings
trespass
against B.
for taking
and carrying
away his
tithes.

21. In trespass the defendant *justified the entry and the cutting of the corn, because C. M. was seised of the place, &c. in fee, and sowed the land, and the defendant as servant, &c. entered and cut, &c.* and by all the justices where he justifies as servant, &c. he shall not give colour to the plaintiff. Br. Colour, pl. 54. cites 18 E. 4. 3.

The defendant pleads, that the king was seised in fee of the rectory to which the said tithes belong, and gave them by patent to C. for life, who made a lease for years of them to E. and that the defendant, as E.'s servant and by his command, took this corn and carried it away, without giving colour, or shewing the king's patent made to C. The plea was adjudged bad; the plaintiff had judgment affirmed in error. For in the case of parties or privies in interest, who come to a particular estate derived out of another, which requires a deed to create it, as in the case of the king's patent, or a lease of a corporation, or in the case of a grant of a rent, or of any other thing which lies in grant, the first patent or deed ought to be shewn. Otherwise of those who come to such things by act of law; as tenant by elegit, or statute, or tenant in dower, tenant by the courtesy, &c. Jenk. 305. pl. 80. 2 Jac. Dr. Leyfield's case.

S. C. cited 10 Rep. 89. a. b. Arg.——Ibid. 89. b. ad finem cites S. C. and that there needs no colour, because notwithstanding the fee and frank-tenement is to one, yet the plaintiff may have a lease for years, &c. and that with this accords 22 H. 6. 50. a.——But when a special title is made, as in 2 R. 3. 8. a. where John Atwood brought trespass of his close broken against one John Dingle and W. Dingle; the defendant pleaded that one Tho. Atwood was seised, and infeoffed J. B. and R. S. who infeoffed Sir John Norbury, Knt. and the said John Dingle in his own right, and the said W. Dingle as servant to him, and gave colour to the plaintiff by the said Tho. Atwood, cited 10 Rep. 90. a. in principio.

Heath's
Max. 32.
cites S. C.

22. In trespass in lands, the defendant said *that the king gave to him the lands in tail, by virtue of which he seised, &c. and after he leased to the plaintiff at will, and after entered, &c. of which entry*

entry the action is brought, and good colour, per. Cur. by the lease at will; quod nota. Br. Colour, pl. 55. cites 18 E. 4. 10.

23. So if defendant pleads that *W. was seised in fee, and was attainted of treason, by which the king was seised and leased to the plaintiff at will, and after by his letters patents gave the same land to the defendant*; this is good colour. Br. Colour, pl. 55. cites 18 E. 4. 15.

24. In entry *sur disseisin of rent* colour may be given; admitted. Heath's Max. 27. S. P. cites Br. Colour, pl. 56. cites 19 E. 4. 3.

S. C. and says, *sq* is E. 4. 17.

25. He who pleads to the writ shall not give colour, and a man may plead to the writ a plea which goes to the action, and not give colour, and well. Br. Colour, pl. 56. cites 21 E. 4. 4. Heath's Max. 29. cites S. C. —10 Rep. 91. a. in principio cites S. C.

26. In trespass, per Brian, he who justifies for tithes as parson, shall not give colour. Br. Colour, pl. 57. cites 21 E. 4. 18. Heath's Max. 28. cites S. C. but is mis-printed (*distress* for *dismes*). —In trespass of certain loads of oats, taken and carried away at Bodmon, against the prior of Bodmon; the defendant said, that though oats grew in a certain place in B. in the parish of Bodmon, of which he was parson imparsonee; and being compelled by rule of court to shew how he came to the same parsonage, said that he had the impropriation by prescription, and that the corn was severed from the 9 parts, and that he took them as his own goods, and gave colour that he delivered them to one T. who bailed them to the plaintiff to keep, and the defendant took them. 10 Rep. 88. a. Arg. cites 11 E. 4. 65. a. [but it seems mis-printed, and that it should be 21 E. 4. 65. S. C. as in Brooke, pl. 59.] —S. C. cited *ibid*. 90. b. as 21 E. 4. 65. a. —Br. Colour, pl. 59. cites 21 E. 4. 65. that he need not give colour; but Brooke says *quære*. —No colour can be given; for of common right they belong to the parson. Jenk. 306. pl. 80.

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27. So of him who justifies for wreck *de mere bought in market overt, waif or stray*. But Brooke says, *quære inde*. Br. Colour, pl. 57. cites 21 E. 4. 18. Heath's Max. 28. cites 21 Ed. 4. 18. & 15. that colour

may be given where one justifies for wreck, or waifs and strays, or any other matter of record; but says, see there other books, viz. 2 & 12 Ed. 4. 38 H. 6. 7. and 37 H. 6. 7. varying whether one shall give colour where the defendant doth justify for wreck, waifs, and the like, &c. and so 34 H. 6. 10. in the same, and for offerings. —10 Rep. 90. b. 91. a. S. C. cited per Cur. —Br. Colour, pl. 5. cites 34 H. 6. 10. S. P. —Br. Colour, pl. 59. cites 21 E. 4. 65. S. P. But Brooke says *quære*. —Where a man justifies for wreck he shall give colour, and so he did, quod nota bene. Br. Trespass, pl. 182. —Br. Prescription, pl. 32. cites 9 E. 4. 22. S. C.

28. In trespass, per Brian, if a man justifies by any matter of record, he need not to give colour; but Brooke says, *quære*. Br. Colour, pl. 59. cites 21 E. 4. 65.

29. R. brought writ of forcible entry upon the statute 8 H. 6. against J. B. who pleaded, that J. H. and H. A. were seised, &c. and infeoffed F. and S. in fee, and the defendant as servant, &c. and gave colour as he ought, and traversed the force; for when the defendant makes special title to him in whose right he justifies as servant, there it shall not be intended that the plaintiff has any interest in the land, and so there is a diversity. 10 Rep. 90. a. cites 1 H. 7. 19. a. b. Br. Forcible Entry, pl. 24. cites S. C.

30. He who pleads *devise by testament* shall give colour in trespass or assise; for it is only as a feoffment. Br. Colour, pl. 75. cites 5 H. 7. 10. In trespass the defendant intitled himself by a devise, and

gave colour to the plaintiff. Br. Colour, pl. 41. cites S. C. —Heath's Max. 29. cites S. C.

10 Rep. 91. 31. In *trespafs* it is a good plea, *that the plaintiff leased to the defendant for term of life*, for the lessor has *interest by the reversion* to enter, and see if there be waste or not, and therefore a good plea without other colour. Br. Colour, pl. 77. cites 6 H. 7. 14. per Brian.
 a. in principio, cites S. C. and 13 H. 7. 6. that when the defendant intitles himself by the plaintiff himself, no colour shall be given.

32. *Contra upon feoffment*, for this amounts to not-guilty. Br. Colour, pl. 77. cites 6 H. 7. 14.

Br. Trespafs, pl. 166. cites 15 E. 4. 31. S. P. by Pigot. 33. In *trespafs feoffment of the land to W. N. whose estate the defendant has* is no plea in *trespafs* without giving colour, but *immediate feoffment* of the plaintiff to the defendant is a good plea without giving colour; contrary in *assise*. Br. Trespafs, pl. 424. cites 10 H. 7. 22.
 Br. Colour, pl. 84. (85) cites 20 H. 7. 14. the same diversity.

Heath's Max. 29. cites S. C. and 21 H. 7. 23. S. P. 34. In *trespafs*, when the defendant shews cause, and *prays aid of the king*, or *demand judgment rege inconsulto*, he shall not give colour to the plaintiff; per Cur. quod nota. Br. Colour, pl. 28. cites 15 H. 7. 10.

Trespafs in land, the defendant alleged possession in the king; judgment si rege inconsulto there shall not be colour. Br. Colour, pl. 72. (bis) cites 15 H. 7. 10. 35. In *trespafs*, per. tot. Cur. where the defendant intitles himself by *lease of a bishop by copy according to the custom of the manor*, and that *now the temporalities are in the hands of the king*, and demands judgment *si rege inconsulto*, &c. he need not to give colour, as where he pleads in bar; note the diversity. Br. Colour, pl. 33. cites 21 H. 7. 43.

36. Where the defendant *binds the right of the plaintiff by feoffment with warranty, fine, recovery, disseisin, or re-entry*, &c. there needs not any colour. Colour shall not be given but upon plea in bar. Br. Colour, pl. 64.

[559] 37. In an *assise* where *entry and re-entry* are *pleaded with a disseisin*, there is no occasion to give colour. Jenk. 21. pl. 40.

38. Colour shall be in an *assise*, *though the reversion be in the king*. Jenk. 171. pl. 33.

39. If in *bar* defendant fails of giving colour, where it is necessary to give colour, that omission is *remediable by plaintiff's replication*, for he ought to take advantage of his want of colour before he replies; per Holt. 12 Mod. 316. Mich. 11 W. 3. Anon.

40. Where *general issue is specially pleaded* colour should be given, else it is good cause for demurrer; per Cur. 12 Mod. 354. Pasch. 12 W. 3. in case of Horn v. Luines.

41. If you give colour you may plead matter in law specially; as in debt for rent you may plead nil debet, and give a release in evidence; per Holt Ch. J. 12 Mod. 377. Pasch. 12 W. 3.

42. *Trespafs for entering into the plaintiff's house, and keeping the possession thereof for so long. Defendant pleads that J. S. was seised in fee thereof, and he, being so seised, gave licence to the defendant to enter into and possess the said house, till he give him notice*

tice to leave it; that thereupon he entered, and kept the house for the time mentioned in the declaration, and had not any notice to leave it all the time; and a special demurrer, because the plea amounted to the general issue; and per Cur. he might have given this matter in evidence against all people, except J. S. but against him he must have pleaded it; so he should here either have pleaded the general issue, or given colour to the plaintiff. Ergo jud' pro quer'. 12 Mod. 513, 514. Pasch. 13 W. 3. v. Saunders.

43. If one would plead a *plea amounting to the general issue*, he ought to give the defendant colour, *either express or implied*; per Holt Ch. J. 12 Mod. 537. Trin. 13 W. 3. Anon.

(C) What shall be said to be good Colour.

1. **I**N assise it is no colour to say that the land is held of the plaintiff, and that after that the tenant entered by descent the plaintiff as lord abated after the death of the ancestor of the tenant; * but if he had said, that the plaintiff as lord entered, supposing that the ancestor had died without heir, this had been colour. Quære inde; for this is not doubtful to the lay-gents, and he ought to confess it, &c. Br. Colour, pl. 38. (bis) cites 2 Ass. 7.

* Heath's Max. 32. cites S. C. that it is a good colour to say that the plaintiff claimed to enter as lord by escheat, &c.

2. In assise the tenant pleaded dying seised of his father, and that he entered as heir, and the plaintiff abated as son and heir of one J. who was a bastard; and it was held no colour, because there is no privity of blood between them, by which he added to it that J. the plaintiff, as son and heir of J. who was son of R. his father, who was born before the sponsals, claiming to be heir of R. his father, where he was a bastard, abated, &c. and admitted then for colour. Br. Colour, pl. 38. (bis) cites 2 Ass. 9.

3. In assise the tenant pleaded lease for life by J. N. to the father of the plaintiff, the remainder to the tenant, and the plaintiff supposing that his father had died seised in fee, entered, &c. and good colour. Br. Colour, pl. 9. cites 9 H. 4. 3.

Heath's Max. 31. cites S. C. — In assise the tenant gave colour

to the plaintiff, viz. that his father made feoffment, and his heir, viz. the plaintiff, supposing that he had died seised, entered, &c. This seems to be no colour; for it is not matter in law, nor doubtful. Br. Colour, pl. 10. cites 11 H. 4. 3.

4. If a man pleads that J. S. was seised in fee, and died, and one W. entered as heir, who was seised and died, and S. his heir entered, &c. and gives colour by J. S. this is well; for here is no dying seised. Quod nota; for he did not say that he died seised. Br. Pleadings, pl. 149. cites 11 H. 6. 19.

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5. It is good colour that J. N. granted to him the reversion, and the tenant for term of life died, and he claiming by the reversion granted it where the tenant for life did not attorn; for the lay-gents think, that it passes by the grant. Br. Colour, pl. 15. cites 19 H. 6. 21.

10 Rep. 91. b. S. C. cited by the reporter in a nota. — Fitzh. Colour, pl. 8. cites S. C. and all the points fol-

6. So where the tenant says that he leased for life, and the tenant surrendered; for the lay-gents are ignorant if surrender may be by parol. Br. Colour, pl. 15. cites 19 H. 6. 21.

lowing, as cited by Brooke as of the same year.

7. So where the tenant says that the father of the plaintiff leased to J. for life, and after released to him, and the plaintiff supposing that his father died seised of the reversion, ousted him after the death of cesty que vie. Br. Colour, pl. 15. cites 19 H. 6. 21.

8. So if he says that the father of the plaintiff infeoffed him, and after he suffered him to occupy at will, and he supposing that he had died seised, &c. Ibid.

It is good colour that the plaintiff claiming as heir where

9. And so to say that the plaintiff claimed as eldest son, where he was a bastard, &c. is good colour. Br. Colour, pl. 15. cites 19 H. 6. 21.

he was a bastard eigne; but it is no colour if he does not say this word (eigne); for bastard only is no plea nor colour; for bastard eigne may be vouched as heir for the possession. Br. Colour, pl. 36. cites 38 H. 6. 7.

It is good colour, that a man claims as heir where he was a bastard; per Paston. Br. Colour, pl. 14. cites 19 H. 6. 20.—Heath's Max. 72. cites S. C. and says that so it is in the same year, fol. 21. Or to say that the plaintiff pretending title to a reversion without attornment, is a good colour.

In assise the tenant made bar as heir, and the plaintiff claiming as heir where he was born out of any consensuals, entered; and there it was held that he ought to give the plaintiff a mother, and so he did. Br. Colour, pl. 39. cites 25 Aff. 13.

In trespass, it was permitted for colour, that the plaintiff claimed in as son and heir, &c. where he was a bastard. Br. Colour, pl. 66. cites 11 H. 4. 84.

It is no colour, if at the plaintiff claiming as

10. So to say that the plaintiff claimed as youngest son; for this is no difficulty. Br. Colour, pl. 15. cites 19 H. 6. 21.

claiming as heir where he was youngest son, entered, &c. Br. Colour, pl. 36. cites 38 H. 6. 7.

11. So if he says that he leased to the father of the plaintiff for life, for years, or pur autre vie, and he supposes that his father had died seised in fee, &c. this is no colour. Ibid.

12. In trespass the defendant said that A. was seised in fee, and gave to the baron and feme in tail, who died seised, and the land descended to the defendant, and the plaintiff claiming by colour of deed of feoffment by the said A. before the gift, &c. entered, &c. and good colour, though it be given before the dying seised, which binds the entry. And he who pleads in assise that his father was seised in fee, and died seised, and he entered as heir, and gave colour by his father before the descent, yet the colour is good. And so see where the possession is bound, and not the right, yet the defendant shall give colour; contra where he binds both. Quod nota a good diversity here. Br. Colour, pl. 17. cites 19 H. 6. 43.

And per Pri-
sol, in gene-
ral writ of
trespass, it is
good colour of
entry into the
whole by co-
lour of one
moiety per

13. In trespass ubi ingressus non datur per legem, if the defendant pleads feoffment of the moiety, and gives colour to the plaintiff of the moiety, by which the defendant entered into the whole, this is no colour for entry into the whole; for it may be of one moiety severed from the other moiety. Br. Colour, pl. 36. cites 38 H. 6. 7.

my, & per tout, he may enter into the whole; but in this action of trespass upon the Statute of 5 R. 2. the writ expresses into how much he entered, and therefore bar for a moiety to enter into the whole is no plea; for the writ expresses certainty. Quære in the general writ of trespass. Br. Colour, pl. 36. cites 38 H. 6. 7.—Fish. Colour, pl. 29. cites S. C.

14. In trespass of goods waived, if the defendant *says that the plaintiff seized them to the use of the king*, this is no colour if he does not *show that he was bailiff of the king, escheator, or other officer accountant to the king*; per Prisot clearly, but contra Littleton and Danby. Br. Colour, pl. 37. cites 39 H. 6. 2. and see that 9 E. 4. 22. colour was given by him who justified for *wreck de mere*, &c.

15. *Trespass done the 3d of June 36 H. 6.* The defendant pleaded *seoffment the 3d of May 37 H. 6.* and gave colour by the same *seoffor, anno 37 H. 6. absque hoc that he is guilty before this day*, and a good plea. Br. Colour, pl. 45. cites 5 E. 4. 79.

16. *Seoffment of the plaintiff to the tenant* is no plea in assise; *quare of seoffment to J. N. que estate the tenant has*; per Pigot; *quod non negatur*. Br. Colour, pl. 27. cites 15 E. 4. 31.

17. In trespass the defendant justified by *letters patents of king E. 4.* and gave colour to the plaintiff by *letters patents of the same king made to him during the life of J. N. who is now dead*. Nota. Br. Colour, pl. 81. cites 7 H. 7. 14.

18. In trespass for chasing in his park, the defendant *said, that the plaintiff infeoffed two of the park, and he by their command entered and chased*, and a good plea without colour, because he *conveyed the interest of the plaintiff mesne*, and not by a stranger. Br. Colour, pl. 85. (86).

19. Every colour ought to have 4 qualities; 1st, It ought to be *doubtful* to the lay-gents; as where the defendant says, that the plaintiff claiming by colour of a deed of seoffment, &c. this is good; for it is doubtful to the lay-gents, whether land shall pass by deed only, without livery, or not? 2dly, That colour, as colour, *ought to have continuance*, though it wants effect; as if the defendant gives colour by colour of a deed of demise to the plaintiff for the life of J. T. who before the trespass was dead, this is not any colour, because it does not continue, but the defendant may well deny the effect thereof. 3dly, The colour ought to be such, that if it was of any effect it will *maintain the nature of the action*; as in assise to give colour of frank-tenement, and not as guardian in chivalry, nor to his ancestor where the action is of his own possession. 4thly, Colour ought to be *given by the first conveyance*, or otherwise all the conveyance before is waived. 10 Rep. 91. b. Hill. 8 Jac. in a nota by the reporter, and cites several books for the several divisions [which may appear under this title.]

(D) What Colour shall be good in a Writ of Trespass of Goods taken, and what not.

1. **I**N trespass of goods carried away, the defendant *said, that J. N. was possessed ut de proprio, and made the defendant his executor, and died, and the plaintiff claiming J. N. as his villein where he was frank, took the goods, and the defendant retook them,*

and

and the defendant e contra, and so to issue, therefore it is admitted good colour. Br. Colour, pl. 80. cites 47 E. 3. 23.

Heath's
Max. 30, 31.
cites S. C. &
S. P. for
that
amounts only
to the general
issue, but there it is more doubted in another case, where the defendant in *trespass of trees*, did plead, that * he was *seised until by the plaintiff disseised*, who did cut the trees, and squared them; and then he, the defendant, did retake them. Heath & Max. 30.

2. Where a man *confesses possession in the plaintiff of the proper goods of the defendant by a tort mesne*, this is good colour in *trespass*; as of the case of the *chaplain and feme who have the goods of the defendant in their possession*, and the defendant enters the house and retakes them. Br. Colour, pl. 8. cites 2 H. 4. 13.

Heath's
Max. 31.
cites S. C.
—In *trespass of goods carried away*, the defendant justified as executor, and the plaintiff claiming as executor where he was not executor, took the goods, & non allocatur; by which he said, that the testator bailed to him to keep, &c. And the plaintiff said, shew what day he made you executor, & non allocatur; and therefore it seems that the *bailment* is good colour. Br. Colour, pl. 40. cites 1 H. 7. 10.

3. *Trespass by a feme of goods carried away*. The defendant justified as executor of the baron of the same feme, and the feme claimed to be executrix where she was not executrix; *prist*, &c. and this was admitted good colour; quod nota. Br. Colour, pl. 1. cites 2 H. 6. 15. and 19 H. 6. 12.

4. *Trespass of goods taken*. The defendant said, that before the plaintiff any thing had, the property was in S. who bailed the goods to W. to keep, who made the defendant his executor, and the defendant seized them as executor, and the plaintiff took them out of his possession, and the defendant retook them, and a good colour; per Cur. by possession as above without title; quære in assise as it is said there. Br. Colour, pl. 12. cites 7 H. 6. 35.

Heath's
Max. 31.
cites S. C.
5. It is good colour in *trespass brought by a parson*, where the defendant justifies as patron, to give evidence, and colour by lease at will by the last parson who resigned, per Strange and Martin, and some e contra; by which Chaunt. gave colour that the bishop, in time of vacation, granted to the plaintiff to hold the parsonage by a certain time, &c. and this was admitted for good colour. Br. Colour, pl. 13. cites 8 H. 6. 9.

6. In *trespass of goods taken*, it is no colour that the plaintiff claimed by gift of the testator where he did not give, by which he said that he claimed as executor, &c. Br. Colour, pl. 69. cites 19 H. 6. 12.

Heath's
Max. 31.
cites S. C.
—10 Rep.
38. b. Arg.
cites S. C.
—Ibid.
91. a. S. C.
cited per
Cur. says,
7. *Trespass of grain carried away*, the defendant said that he is parson, and the grain grew in such a place, and shewed where, &c. which was his tithes, and he took it as parson, and the plaintiff claiming to be parson there where he was not instituted nor inducted, took them, and he retook them, and the best opinion was, that it is no colour; for he does not confess possession in the plaintiff, but as usurper. Br. Colour, pl. 14. cites 19 H. 6. 20.

that since he took upon him to give colour, if any was necessary, such colour as he gave was not good. *Trespass of carrying away corn and barley*; Markham said, A. B. was parson of C. and the parishioners sowed the 1st day of May, and after the parson made the defendant his executor, and the plaintiff was instituted and inducted parson there, and after the parishioners sowed the tithes, and the plaintiff, as parson, took them as his proper goods, and the defendant, as executor, took them; judgment, &c. and admitted good colour. Br. Colour, pl. 20. cites 21 H. 6. 30. — Br. Emblements, pl. 9. cites S. C. — S. C. cited Arg. 10 Rep. 38. b. but *ibid.* 91. a. it was said per Cur. that colour was given in that case, but that there was no rule of court for the giving it.

8. In trespasss of charters and minuments taken at D. it is no plea that the property was to J. N. who bailed to the defendant, and the plaintiff took them, and the defendant retook them; for no colour is given to the plaintiff. Br. Colour, pl. 22. cites 21 H. 6. 36.

Quere, where he says that the property was to J. N. who bailed

them to W. P. who gave to the plaintiff, who took them, and J. N. retook them, and gave them to the defendant; judgment, &c. Br. Colour, pl. 22. cites 21 H. 6. 36.

It is good colour that J. was possessed and bailed to T. who gave to the plaintiff, and the defendant retook. Br. Colour, pl. 71. cites 21 H. 6. 37.

Trespass of taking slippers and shoes, the defendant said, that he was possessed of three dickers of leather, and bailed them to J. S. who gave them to the plaintiff, who made thereof slippers, shoes, and boots, and the defendant came and took them, prout ei bene licuit; judgment si actio, and good colour per Cur. by gift of the bailiff, because he had lawful possession. Br. Colour, pl. 42. cites 5 H. 7. 15.

9. It is no colour in trespasss of goods that J. was possessed and bailed to the defendant, and the plaintiff took them, and the defendant retook them. Br. Colour, pl. 71. cites 21 H. 6. 37. [563]

10. Colour was given in trespasss of corn, where the defendant justified as tithes severed from the 9 parts, &c. gave colour that the plaintiff supposing the place where, &c. to be in the parish of D. where M. P. is parson, where it is in the parish of A. where the defendant is parson, which M. P. had sold to the plaintiff all the tithes in the parish of D. came, and would have taken the corn, and the defendant would not suffer him, and good colour, and the plaintiff recovered upon verdict. Br. Colour, pl. 25. cites 21 H. 6. 43.

11. Trespass of goods taken, the defendant said that J. N. was thereof possessed and made the defendant his executor and died, and he seized them and bailed them to the plaintiff for him to re-bail them, quando, &c. and he requested him to re-bail, and he would not, by which he took them, &c. and the opinion of the court was, that it is no colour; for the property was never out of him, &c. Br. Colour, pl. 2. cites 28 H. 6. 4.

12. Trespass of taking and carrying away his timber; the defendant said that the place is 20 acres, where 20 wyches grew, which was the frank-tenement of the defendant, and the plaintiff entered and cut the wyches and made timber and carried them away out of the land, and the defendant came and retook; judgment; and per Littleton it is good colour, because the wyches were frank-tenement in the defendant, and in the plaintiff they were chattles, viz. timber. But Prisot contra; for though the nature is altered, yet it is one and the same thing which may be well known, and the property is in the owner of the soil when they are cut, till they are carried away, therefore no colour. Br. Colour, pl. 6. cites 35 H. 6. 2.

And so long as the defendant confesses that the frank-tenement is in him, and not in the plaintiff by disseisin nor otherwise, is no colour; quod nota, and therefore does not

amount but to the general issue, viz. that it was the timber of the defendant, and the plaintiff took it, and the defendant retook it, and is not guilty in effect; by which the defendant said that J. N. cut the trees, and gave them to the plaintiff, and the defendant retook them, and the plaintiff imparled. Br. Colour, pl. 6. cites 37 H. 6. 6. And it is no plea, that the property was in his master, without giving colour. Ibid. cites 2 H. 4. 5. — Heath's Max. 30. cites S. C.

13. Trespass of sheafs taken. Littleton said actio non; for the place is 10 acres, of which the defendant was seized in fee, and before the trespass the plaintiff came and plowed the land, and sowed it with his own grain, and the defendant entered and cut the corn and put it into sheafs, and at the time of the trespass, the plaintiff came and would have carried

In trespasss of corn, it was admitted good colour, that the plaintiff entered and

sowed the land of the defendant after the death of the tenant for life, and the defendant entered, and cut, and carried away. Br. Colour, pl. 68. cites 38 E. 3. 28.—Trespas of corn taken wrongfully. Per Fineux Ch. J. it is a good bar

and colour in itself, that the place where is two acres of land, of which the defendant was seised in fee, and the plaintiff sowed the land with his proper grain, and the defendant cut and took it. Br. Colour, pl. 44. cites 12 H. 7. 25.

So, that the defendant was seised till by the plaintiff disseised, who sowed the land, and the defendant re-entered, and took the corn; quod nota. Br. Colour, pl. 44. cites 12 H. 7. 25.

[564] 14. In trespass upon the statute of 5 Rich. 2. 7. the defendant pleaded that a long time before the trespass *A.* was seised of the land in fee, and being so seised gave it to the defendant's father in tail, who died seised, and the said land descended to the defendant, and gave colour to the plaintiff by *A.* the plaintiff replies that he was seised in fee till the defendant entered upon him and ousted him; and he traverses the gift in tail, and this is well by all the judges of England. For no possession shall be intended in the defendant but by this estate tail, which he himself has pleaded. An estate tail cannot be gained by disseisin, melior est conditio possidentis, ubi neuter jus habet. The first possession will serve to maintain trespass where the defendant has not a title. In this case, the colour given by the defendant to the plaintiff, gives the plaintiff the first possession. Jenk. 118. pl. 36. cites 3 E. 4. 18.

15. In trespass it was admitted for good colour, that *J. N.* before that the plaintiff had any thing, was possessed of the goods *ut de proprio*, and gave them to the defendant, and made the plaintiff his executor and died, by which the plaintiff was possessed, and the defendant took them, &c. and so see that the executor finding the goods among other goods, is good colour. Br. Colour, pl. 65. cites 1 E. 5. 3.

But where a man bails his goods to *J. N.* and he bails them to *W. S.* this is good colour to *W. S.* because it is not immediate bailment by the defendant to the plaintiff. Br. Colour, pl. 43. cites 5 H. 7. 18.

16. In trespass of boards taken, the defendant said that he was possessed of them, and delivered them to the plaintiff to keep, and redeliver them, quando, &c. and he carried them to *D.* and the defendant retook them, and no plea, for there is no reasonable colour; for he never confessed property in the defendant, and the immediate bailment to the plaintiff by the defendant is no colour; for he does not confess interest in the plaintiff. Br. Colour, pl. 43. cites 5 H. 7. 18.

17. But

17. But if the defendant pleads *bailment upon condition*, or gift upon condition, and for the condition broken he retook it, this is good colour; for the party has interest for the time, and by the condition broken the property is re-vested in the defendant, and he may bail it or give it immediately without any seisin. Br. Colour, pl. 43. cites 5 H. 7. 18.

And in trespass it is a good plea that he bailed the goods in pledge, and paid the money and retook them;

for the plaintiff has interest quousque, &c. Br. Colour, pl. 43. cites 5 H. 7. 18.

18. So of bailment of sheep by the defendant to the plaintiff to composter his land, and after he retook them, this is good colour to the plaintiff; for he has property *pro tempore*, and all those cases were agreed. Br. Colour, pl. 43. cites 5 H. 7. 18.

19. In trespass of goods, the defendant said that J. was possessed and bailed to the plaintiff, and after J. gave to the defendant who took them; and good colour; for the bailee has property against all but the bailor, and there is no privity between the bailor and the donee. Br. Colour, pl. 76. cites 6 H. 7. 7.

Heath's Max. 31. cites S. C. but cites 28 H. 6. 4. that to give the plaintiff

colour only by a bailment is ill, notwithstanding that to give him colour by the gift of the defendant, as bailor, is good by 7 H. 6. 31. — The case was, in trespass of beasts taken, the defendant said that before the plaintiff any thing bad, he was possessed as of his proper goods, and bailed to A. B. to rebail to him quando, &c. and A. B. gave to the plaintiff, and he supposing the property to be in A. B. at the time of the gift, took them, and the defendant retook them, and a good plea and good colour. Br. Colour, pl. 11. cites 7 H. 6. 31.

20. In trespass of corn, &c. cut and carried away, the defendant pleaded that 10 Eliz. he was seised of the rectory of O. and demised the same to A. for life, who demised to B. for years, and the defendant as servant to B. took the said corn, &c. as tithes severed from the 9 parts, and averred the life of B. The plaintiff demurred, for that the plea amounted to the general issue; and judgment was given in B. R. for the plaintiff. The defendant brought error in Cam. Scacc. and assigned for error, that the plea amounted to the general issue only, because the defendant did not give the plaintiff any colour, and therefore judgment ought not to be given against the defendant, but only a respondeas ouster. But resolved that in this case colour ought not to be given to the plaintiff; for he need not deny the property of the plaintiff; because the matter of the plea bars the plaintiff of his right. 10 Rep. 88. a. Hill. 8 Jac. Dr. Leyfield's case.

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(E) Where Colour given by an Estate which is void or determined, shall be good, or not.

1. IN assise the case was that the feme was seised in fee, and took baron, and had issue T. The baron and feme died. T. entered and died seised without heir of his body. The tenant entered. The plaintiff claiming as cousin and heir of the part of the father abated, and the tenant re-entered; and good colour as heir of the part of the

Heath's Max. 32. cites S. C. and cites also 21 H. 6. 43. [but the book seems

the

to be misfeigned] that it was doubted whether it was a good colour to say that the plaintiff claimeth by the son and heir of him by whom the defendant pretends title.—Heath's Max. 32. says it appears by 2 Ass. 7. that to give the plaintiff colour by abatement, is no colour.

the father, though the land came of the part of the mother. Br. Colour, pl. 29. cites 24 E. 3. 50.

2. Entry in the nature of assise; the tenant said that F. his father was seised in fee, and leased to N. for life. N. died, and F. entered in his reversion and died seised, and the tenant entered as heir, and the demandant claimed by deed of feoffment made by N. &c. and it was held no colour; for by the death of the tenant for life, and the entry of the lessor, the estate of N. is determined, and the title is by the dying seised of the father, and the tenant cannot enter upon a descent by him whose estate was determined before, and so to give colour by a disseisor, and confess entry upon him, or by feoffee upon condition, and confess entry upon him by the condition; for his estate is defeated. Br. Colour, pl. 49. cites 2 E. 4. 17.

3. Per Littleton, if I say that J. S. was seised and infeoffed me, and after J. S. infeoffed the plaintiff, upon whom I entered, this is no colour; for by the plea I have destroyed the colour, quod nemo dedixit; for J. S. at the time of the feoffment of the plaintiff was a disseisor, which is purged by the entry. Br. Colour, pl. 55. cites 18 E. 4. 15.

Heath's
Max. 30.
cites S. C.

4. Entry sur disseisin of rent of disseisin done to the predecessor of the plaintiff. The tenant said that W. N. was seised of the rent in fee, and granted it to the predecessor of the demandant for term of his life, and after W. died, and then the predecessor died, and the tenant entered as son and heir of W. N. and it was held good colour by all the justices and serjeants except Brian. And Brooke says it seems to him, that estate determined cannot be colour; for it is not doubtful to the lay-gents nor matter in law, and therefore it is contrary to the ground of the colour. Br. Colour, pl. 56. cites 19 E. 4. 3.

Heath's
Max. 30.
cites S. C.
and says that
it seems by
the book,
that though
the estate
appears to be
determined,
yet the colour
is good.
* [566]

5. Trespass in separali piscaria against an abbot. The defendant prescribed in the piscary there, and that the abbot, predecessor of the defendant who prescribed, leased to the plaintiff for life and died, and that this defendant was elected abbot, and fished, and a good colour; per Cur. Brooke * says that it seems the lease was for the life of the lessor, for an abbot cannot discontinue, and therefore if it was for the life of the lessee it is no bar; but that this does not appear by the book which is reported briefly. Br. Colour, pl. 78. cites 7 H. 7. 13.

(F) By claiming in by Deed, &c. Where nothing passes by it, and where good.

Heath's
Max. 32.
cites S. C.

1. ASSISE by baron and feme against the prioress of C. who said that she herself leased for term of life to the baron and feme, and the feme dying the baron took this plaintiff to feme, and the tenant confirmed their estates for term of life. The baron died, the
tenant

tenant entered as in his reversion, and the second feme plaintiff claiming by colour of the confirmation, which is void as to her, held her in; and good colour, per Finch. though it be a void confirmation. Br. Colour, pl. 79. cites 40 E. 3. 23.

2. So, to say that a feme entered, claiming to have the land in dower, and yet a feme cannot enter into her dower without assignment; and yet good colour, per Finch. quod Caund. concessit, by reason that she has colour to claim dower. Br. Colour, pl. 79. cites 40 E. 3. 23.

Heath's
Max. 32.
cites S. C.
& S. P.

3. So, per Finch. to say that the father of the tenant leased to the plaintiff for years, and the tenant being within age confirmed his estate, and he after the term ended claimed in by this confirmation; but if the father had been tenant in tail, and the issue confirmed within age, Brooke says it seems to him that this shall be good colour, &c. whereupon the plaintiff above made title. Br. Colour, pl. 79. cites 40 E. 3. 23.

Heath's
Max. 32.
cites S. C.
& S. P.

4. Forcible entry into the manor of D. The defendant said that before the plaintiff any thing had, A. was seised in fee, and gave to B. and C. his feme, and to the defendant, and to the heirs of the baron, and the baron and feme died, and the plaintiff claiming by deed of the baron and feme, where nothing passed by the deed, entered with force, &c. and the colour was challenged, because the baron and feme were dead before the claim; & non allocatur, by which he challenged, because it is no colour but only to the moiety, & non allocatur, because one jointenant may infeoff another of all the land. Br. Colour, pl. 19. cites 19 H. 6. 49.

Br. Colour,
pl. 70. cites
S. C.

5. In forcible entry with force, and detainer with force, the defendant pleaded that long before the plaintiff any thing had, he himself was seised in fee, and disseised by the plaintiff, upon whom he entered peaceably, and traversed his entry with force, or detainer with force; and Paston J. held this a good plea and colour; but Markham Serj. e contra, that it is no colour; whereupon the defendant said that T. H. was seised in fee, and died seised, and the land descended to the defendant, and the plaintiff claimed by deed of feoffment made by T. H. where nothing passed, &c. whereupon the defendant as son and heir of T. H. entered peaceably, absque hoc that he entered with force. The plaintiff replied that W. was seised, and infeoffed him, whereby he was seised till the defendant ousted him with force, absque hoc that the said T. H. died seised, and so to issue. Br. Forcible Entry, pl. 5. cites 21 H. 6. 39.

Br. Colour,
pl. 23. cites
S. C. Co.
lour shall be
given in
forcible en-
try where
the defend-
ant does not
bind the
plaintiff.

6. Entry in the quibus of disseisin to the father of the demandant. The tenant said that B. recovered the manor of D. against C. of which the land in demand is parcel, que estate of the said B. the tenant has, and * the demandant claimed by deed made by the said C. where nothing passed, &c. and so gave colour by him whose estate is defeated, and yet good colour; per Cur. Br. Colour, pl. 30. cites 9 E. 4. 18.

* [567]
Heath's
Max. 30.
S. P. cites
2 H. 4. and
9 E. 4. 15.
[but it seems
misprinted,
and that it

should be (18) as in Brooke.]

7. So where tenant in assise says that he was seised till by B. disseised, and the plaintiff claiming by colour of a deed made by the said B.

In trespass,
if the tenant
says that he
&c.

*was seised
till by the
plaintiff dis-*

&c. entered, upon whom he re-entered; and good colour per Cur. Br. Colour, pl. 30. cites 9 E. 4. 18.

seised, upon whom he re-entered, this is no colour; for it is not matter in law, nor difficult to the lay-gentle. Br. Colour, pl. 15. cites 19 H. 6. 21. — Br. Colour, pl. 67. cites 9 H. 6. 32. S. P.

8. *Trespass by H. B. warden of the chantery of D. and the chaplains thereof. The defendant said that the said H. B. was seised in fee, and leased to him for years, and no plea; for the warden without the chaplains cannot lease, and it shall be by deed, by which he said by a strange name that H. B. was seised, and leased and gave colour to the plaintiff for term of life by deed of H. B. and no colour per Cur. For a corporation cannot die, therefore he shall not say for term of their lives, by which he gave colour for term of life of the lessor. Br. Colour, pl. 60. cites 21 E. 4. 75.*

(G) Where Colour, without alleging or confessing Possession or Property in the Plaintiff, shall be good or not.

1. *Trespass upon the 5 R. 2. The defendant said that the father of the plaintiff was seised of the land in fee, and held of C. in chivalry, and died, the plaintiff within age, by which C. seised the ward of the land and body, and granted it to J. S. who granted it to the defendant, &c. and the defendant entered, &c. and this good colour without possession in fact in the plaintiff; for there is possession in law, and if the guardian be ousted, the heir shall have assise; and so upon lease of the father for years, &c. Et Cur. conceffit that it was good colour. Br. Colour, pl. 47. cites 2 E. 4. 5.*

2. In trespass the defendant *said that F. was possessed of the goods, and bailed them to the defendant, and after F. gave them to the plaintiff, and the defendant took them; and no colour, inasmuch as the plaintiff was not possessed by reason of the gift, and without possession he cannot have action. Br. Colour, pl. 73. cites 2 E. 4. 23.*

Br. Essay,
pl. 6. cites
12 E. 4. 5.
S. C. —
20 Rep. 90.
b. S. C. cit-
ed per Cur.
as 12 E. 4.
5. b. [and
so it is in the
year-books,
pl. 14.] and
that by his
shewing that
they were

3. In trespass the defendant *justified for waif. The plaintiff challenged for default of colour; and it was said that if he intitles himself to estray, that he need not confess property in the plaintiff; for if the property was in him, yet by the stealing and waiving, the goods are forfeited. Br. Colour, pl. 52. cites 12 E. 4. 6.*

4. *And it was held by all the justices that if the defendant had said that A. had been possessed of the goods as of his proper goods, and that B. had stole them, &c. that he ought to give colour to the plaintiff; but where he says that they were stole extra possessionem ignoti, there needs no property. Br. Colour, pl. 52. cites 12 E. 4. 6. [5. b.]*

stolen extra possessionem cujusdam ignoti, and so it is not denied that the property was the plaintiff's, therefore he is not bound to shew expressly in whom the property was.

5. *So of sale in market overt*, if he says that N. sold to him, he need not give colour. Br. Colour, pl. 52. cites 12 E. 4. 6. S. P. per Brian & Fairfax, Br. 5. b. S. P.

6. *Contra* if he says that N. was possessed as of his proper goods, and sold them to him; for there he proves no property was in the plaintiff, and then he has no colour of action, but in the other case it is not denied but that the property was in the plaintiff, and there colour need not be given. Br. Colour, pl. 52. cites 12 E. 4. 6. [5. b.] 10 Rep. 90. b. cites 12 E. 4. 5. b. S. P. that if he says he sold them to him in market overt, he ought to give

colour. But the reporter says it seems to him that this case is not well reported; for the reason there given makes against the opinion of the justices; for their reason is, that the plea shall not be good without colour, when the property is alleged in a person certain, because this proves that there was no property in the plaintiff, and so has no colour of action, and consequently this is a good reason that no colour shall be given, because it is an absolute bar of the property, and of all the right of the plaintiff; and so is the book of 32 H. 6. 1. a. b. in the same case, when the property is alleged in a person certain; and with this accords 21 E. 4. 18. b. and 21 E. 4. 65. a.

7. *So per Cat. & Pigot*, where a man justifies for damage feasant, he shall not give colour; but there he does not claim property in the goods. Br. Colour, pl. 52. cites 12 E. 4. 12.

8. *Trespass of a clove broken, and apples taken, &c.* The defendant justified the entry by lease for a year, and the apples grew there, and the opinion was, that this was no colour for the apples; for it shall be intended that the plaintiff had property by other matter, by which the defendant gave colour by possession in the plaintiff. Br. Colour, pl. 58. cites 21 E. 4. 52.

9. It is good colour in *trespass of sheafs between parson and vicar*, that the plaintiff claimed them as parson, and the vicar took them; for by the claim the property is in him, and the possession also, though he does not claim them, quod Brian and Chocke conceffit. Br. Colour, pl. 62. cites 22 E. 4. 23. Br. Property, pl. 35. cites S. C. —Heath's Max. 32. cites S. C. —10 Rep.

89. a. versus finem Arg. cites S. C.

10. A naked colour in an *ejectione firma* is not sufficient, as it is in assise or trespass, &c. which does not comprehend any title or conveyance in the writ or count, as this action does in both. D. 366. a. pl. 35. Mich. 21 & 22 Eliz. in *Ld. Cromwell's case*, and says, that according to this is L. 5. E. 4. 5. in *formedon* much argued. But it seems it should be L. 5. E. 4. 9. and so it is in the margin of *Dyer*, 366.

(H) Where Colour given, and after destroyed by Pleading, or given by a Stranger, or one whose Estate appears in Pleading after to be defeated and avoided, shall be good or not.

1. **T**HE alienation which he in remainder defeated by his entry was admitted for good colour, viz. the alienation of the tenant for life to the plaintiff. Br. Colour, pl. 67. cites 2 H. 4.

2. *Trespass, the baron was seized, and infeoffed D. in fee, and conveyed the descent from D. to J. and from J. to G. some of the defendant,*
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*defendant, as sister and heir, and the defendant in right of his feme entered, and the plaintiff claimed by colour of a deed of feoffment made by N. son of the said * R. the feoffor, where nothing passed, &c. entered, upon whom the defendant re-entered, and did the trespass.* Port. said this is no colour, but Newt. and Past. justices e contra; for he has acknowledged the franktenement was once in the plaintiff. Port. said, in assise it is no plea, quod fuit concessum. Afterwards Port. said it is not good; for it is given by N. son of R. the feoffor, and he has not shewn that N. ever had possession, and therefore it is not to the purpose, though N. was heir to R. And also the defendant said that it is not good, inasmuch as he says that he re-entered, and cut the trees, in which case, at the time of the trespass supposed, the franktenement was in the defendant, and so no colour to the plaintiff, and as to this intent the plea was held good by all the justices, and so to the other intent; for the franktenement was confessed in the plaintiff at one time, by which the plaintiff had judgment to recover. Br. Colour, pl. 24. cites 21 H. 6. 40.

3. It is no plea that the baron of a feme was seised, &c. and died, and W. M. abated, and endowed the feme, and the plaintiff claimed by colour, &c. made by W. N. This is no colour for the feme, after the endowment is in by the baron, and the estate of the abator determined. Br. Colour, pl. 36. cites 38 H. 6. 7.

Heath's
Max. 29,
30. cites
S. C.

4. Entry in the quibus; the tenant said, that J. S. was seised in fee, to whom J. D. released all his right by his deed, &c. and J. S. infeoffed H. que estate the tenant has, and gave colour to the plaintiff by J. S. and J. D. who released, and was not seised; per Priot, the colour by J. D. is not good, by which Laycon gave colour by J. S. only; quod nota; and by the reporter the first colour was good; for by Littleton, if it be void by J. D. yet it is good by J. S. Br. Colour, pl. 35. cites 38 H. 6. 5.

5. Trespass ubi ingressus non datur per legem; the defendant said, that before the entry J. S. was seised in fee, and infeoffed him, and that P. claiming the land by colour of a deed made to him by J. S. before the entry, and before the feoffment made to defendant, entered and infeoffed the plaintiff, and the best opinion was, that it is no good colour, because it is given by P. a stranger, and not by J. S. by whom the defendant claimed, and after the defendant amended it, and by the reporter the court stayed in this the more, for that it would be an ill example of changing the ancient course of pleading than for any default in the colour. Br. Colour, pl. 36. cites 38 H. 6. 7.

(I) Where, and in what Actions Colour shall be good, without an immediate Entry upon the Plaintiff. In what not.

1. **I**N trespass, the defendant said, that *J. S. was seised, and disseised by B. who infeoffed the plaintiff, upon whom J. S. re-entered, que estate the defendant has*, this is no plea, per Brian; and the justices of B. R. because the entry of the defendant is not immediately upon the plaintiff, and then this is no colour to the plaintiff; contra if the entry had been immediately by the defendant upon the plaintiff, to whom the said *J. S. had released all his right*, and yet there the defendant was trespassor to the plaintiff till the release came; but Brooke says, it seems that the plaintiff shall not punish this without regrefs, and he cannot make regrefs after the release. Br. Colour, pl. 83. cites 5 H. 7. 11.

(K) By whom, or to whom it must or may be [570] given.

1. **I**N trespass the defendant pleaded his frank-tenement; the plaintiff said, that before the defendant any thing had, *F. was seised, and infeoffed him, and the defendant claiming by colour of a deed, &c. made by F. where nothing passed, entered, upon whom he re-entered, and brought the action*, and per tot. Cur. he shall not give colour to the defendant, but colour shall be given only to the plaintiff, but he shall say that *F. infeoffed him, by which he was seised till the defendant entered, &c. and disseised him, upon whom he re-entered and brought the action*. Br. Colour, pl. 16, cites 19 H. 6. 32.

Heath's Max. 30. cites 9 H. 6. 32. [but seems misprinted for 19 H. 6. 32.] that where the defendant in assise or trespass pleads that he was seised till by

A. disseised, who did infeoff the plaintiff, and he did enter, and a good colour.

2. In trespass of trees cut; the defendant said, that *W. N. was seised in fee, and gave to J. in tail, and died, and the land descended to S. who died, and the defendant as son and heir entered, and gave colour by S. Quod nota*; and not by W. nor J. and yet admitted. Quære, inasmuch as it is by one mesne in the conveyance. Br. Colour, pl. 21, cites 21 H. 6. 32.

Colour ought always to be given by him who is first in the conveyance, or otherwise all before is

waived. 10 Rep. 89. b. Arg. says, that with this accords * 10 H. 7. 14. b. 15 E. 4. 32. a. 18 E. 4. 10. a. and 22 E. 4. 25. a. — Ibid. 91. b. per Cur. S. P. accordingly, and cites 10 H. 7. 14. b. 15 E. 4. 32. a. 18 E. 4. 10. a. 22 E. 4. 25. a. Long. 5 E. 4. 134. a. and 21 H. 6. 32. b. * Br. Colour, pl. 84. (85) cites S. C.

3. In trespass, the defendant pleaded fine levied between *T. and C. and the plaintiff claiming for term of life by lease made by T. where nothing passed*, and Wangf. would have demurred, because in the pleading of the fine the defendant did not shew seisin in the one nor the other, who were parties to the fine, but said *quod finis se levasset*

X x 2

inter,

inter, &c. by which T. acknowledged all the right, &c. for the fine is good if the one or the other be seised, by which the defendant said that T. was seised, &c. and levied the fine between him and the said C. and gave colour as above, and then well, &c. Br. Colour, pl. 4. cites 34 H. 6. 1.

4. Where a man *claims by divers feoffments to his father, who died seised*, it is better to give colour by the father than by the first feoffor; for this is the title to the heir. Br. Colour, pl. 49. cites 2 E. 4. 17.

Heath's
Max. 29.
cites S. C.
— And
concordat 3
E. 4. N.
[17] that
where a man

5. Note, that it was admitted, that in trespass, if the defendant *pleads feoffment by A. to B. who infeoffed C. who after infeoffed the defendant*, he may give colour by A. to the plaintiff, or by B. or by C. who was in the mesne conveyance, quod nemo negavit. Br. Colour, pl. 46. cites L. 5 E. 4. 134.

where a man *alleged gift in tail and several descents, and gave colour by him who last died seised, and well.* Br. Colour, pl. 46.

Colour must
always be
given by the
first, and not
by any
mesne in the
conveyance.
Heath's
Max. 29.
cites S. C.
— 70
Rep. 89. b. Arg. cites S. C.

6. *Entry in the quibus, the tenant said that his grandfather was seised, and by protestation died seised, and the land descended to his father, who entered, and was seised, and by protestation died seised, and the land descended to the defendant as son and heir, and gave colour by the father, and because he did not give colour by the grandfather, therefore the descent to the father is void, and shall be ousted, and so he was; contra if he had given colour by the grandfather.* Br. Colour, pl. 63. cites 22 E. 4. 24.

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7. So where he *says that J. being seised, infeoffed B. who infeoffed the defendant, and gives colour by B.* the feoffment of J. shall be ousted; contra if he had given colour by J. quod nota, per Brian, Catesby & Vavisor, by which the first descent was ousted. Br. Colour, pl. 63. cites 22 E. 4. 24.

Heath's
Max. 31.
cites S. C.

8. Note, that colour ought to be matter in law, and doubtful to the lay-gents, and *shall be given to the plaintiff, and not to one who is mesne in the conveyance, and shall not be given to a stranger who infeoffed the plaintiff, and shall not be given by possession determined, viz. where it appears in pleading that the possession is determined.* Br. Colour, pl. 64.

9. He who *claims no property in the thing, but takes it as a distress, &c.* shall not give colour. Br. Colour, pl. 64.

For more of Colour in Pleadings in general, see *Mise, Traverse, Trespass*, and other proper titles.

Commissions and Commissioners.

(A) Good. And what may or must be done by Commission, and what by Writ.

1. **I** F commission issues to take J. S. and his goods, without indictment, or suit of the party, or other process, this is not good; for it is against the law; per Cur. Br. Corone, pl. 194. cites 42 Aff. 5. 12, 13.

S. P. and one who justified imprisonment of the party by this commission,

the commissioners of oyer and terminer took from him this commission, because it was against law, and said they would shew it to the king's counsel; quod nota. Br. Commissions, pl. 15. cites 42 Aff. 5. — A commission was made under the great seal, to take J. N. (a notorious felon) and to seize his lands and goods. This was resolved to be against the law of the land, unless he had been indicted or appealed by the party, or by other due process of law. 2 Inst. 54. cites 42 Aff. 5. Rot. Parl. 17 R. 2. Nu. 37.

2. And if writ issues to enquire of champerty, conspiracy, confederacy, ambodextries, or to inquire what felony J. S. did to W. N. all indictments taken by force of such writs are void, and the parties shall be dismissed, and shall not be put to answer; for it ought to be by commission. Ibid.

S. P. and per Kalvet J. this writ issues against law; for this is no warrant to

them without commission, and damaged that which was done, &c. by advice of all the justices; quod nota. And Brooke says, so that a thing cannot be done by writ which ought to be by commission. Br. Commissions, pl. 16. cites 42 Aff. 12. — S. C. cited 4 Inst. 164.

3. A commission is a delegation by warrant of an act of parliament, or of the common law, whereby jurisdiction, power, or authority is conferred to others; for all commissions of new invention are against law, until they have allowance by act of parliament. 4 Inst. 163. cap. 28.

No new commissions can be framed without act of parliament, how necessary so-

ever they seem to be; and commissions of new inquiries, &c. and of new invention, have been condemned by authority of parliament, and by the common law. 2 Inst. 478, 479.

4. Commissions under the great seal were directed to several commissioners within several counties, to inquire of divers articles annexed to the commissions, and which were to enquire of depopulations of houses, converting arable land into pasture, &c. but that they should have no power to hear and determine the said offences, but only to enquire of them. Resolved by the 2 chief justices and 7 justices, that the said commissions were against law, because the offences inquirable were not certain within the commission itself, but in a schedule annexed to it; and also because it was to inquire only, which is against law; for thereby a man may be unjustly accused by perjury without remedy, it not being within the statute of 5 Eliz. and the party may be defamed,

Commissions and Commissioners.

famed, and shall not have any traverse to it. 12 Rep. 30, 31. Trin. 5 Jac. The Case of Commissions.

4, 6 Ann. cap. 7. s. 27. *No greater number of commissioners shall be made, for the execution of any office, than have been employed in the execution of such office before the first day of this parliament.*

(B) Who may be Commissioners. And their Power.

1. **I**F any are made commissioners, and afterwards others are made commissioners, the first commission is determined. Godb. 105. pl. 123. Mich. 28 & 29 Eliz. C. B. Anon.

2. One who has been solicitor in a cause, is *not fit to be a commissioner in the same cause*, Godb. 193. pl. 276. Trin. 10 Jac. C. B. Fortescue v. Coake.

3. A commission was directed out of *chancery on ded. potest. to A. & al'*. The other commissioners would examine A. their fellow-commissioner as a witness; and by the opinion of Anselm, they cannot compel him to be examined, which Doderidge granted; Brook of the Middle-Temple e contra. *Quare*, that if he would assent to be examined, if yet this examination be not taken *coram non judice*. 2 Roll. Rep. 90. Pasch. 17 Jac. B. R. Sir Nich. Parker's case.

4. Time and place is only for the fixed [first] meeting of the commissioners; but after they may *adjourn* to another time or another place; per Ld. Chancellor. Chan. Cases, 282, Trin. 28 Car. 2. Brown v. Vermuden.

5. A commissioner may be a witness, but then he ought to be examined before any other witness be examined. Vern. 369. pl. 362. Hill. 1685. Bright v. Woodward.

And if others are examined before him in his presence, he cannot be afterwards examined, having heard the former examinations; and therefore the 17th of Dec. 1681, a commissioner who had so done, came as afterwards and was examined in court, and his deposition was suppressed. 2 Chan. Cases, 79. Mich. 33 Car. 2. North v. Champenoon.

(C) Misbehaviour of Commissioners, What is. And punished how.

1. **A** Commissioner certifying falsely that a witness was examined on oath and sworn, who never was examined, is a great fault, and fineable. Cro. E. 623. pl. 17. Mich. 40 & 41 Eliz. B. R. Fish v. Thoroughgood.

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Commissioners to be examined upon occasion of partiality and practice. Toth. 102. cites 9 Car. Morgan v. Bowdler,
2. Commission to examine witnesses went out to Sir Alexander Brett and others, who made certificate against Sir Alexander of *partial proceedings*. Phillips Serj. moved at the rolls for a commission to others, to examine in whom the misdemeanor was, if in Sir Alexander, or in the certifiers, & *furt negatum*; for such *collateral certificates* are not required of the commissioners; but let them certify the matters committed to their charge, and if there be misdemeanor, let the party wronged thereby make affidavit

deavit thereof, and then take out his *attachment*. Cary's Rep. 43. cites 13 Nov. 1 Jac.

3. If a commissioner in a cause in Canc. *takes bribes* for the executing thereof, he may be indicted and fined by the common law; per Popham Ch. J. Cro. 65. pl. 4. Pasch. 2 Jac. C. B. Moor v. Foster.

But no remedy lies by *action*, per a justices. *Ibid.* — Yelv. 62. Show. 343.

S. C. — S. C. cited Arg.

4. The plaintiff's commissioner would not let a witness declare the whole truth, but *held him strictly to the interrogatories to stifle the truth*, this was held a misdemeanor, and that commissioners to examine ought to be indifferent, and by all means to express the truth, and they are not strictly bound to the letter of the interrogatories, but to every thing also which arises necessarily upon it for manifesting all the truth concerning the matter in question; and where one of the commissioners *went out of the place to the plaintiff* into another room during the examination, and had private conference with him, it was held that a commissioner ought not before publication, to *discover* to any of the parties what any witness has deposed, nor to *confer with the party after he has begun to examine* on the interrogatories to take new instructions to examine further than he knew before, and if he does he is punishable by fine and imprisonment. 9 Rep. 70. b. 71. a. Trin. 9 Jac. in the Star-Chamber, Peacock's case.

5. One of the commissioners *letting the defendant escape* being taken upon a commission of rebellion, was *to stand committed* to prison till he brings in the defendant. Toth. 100. cites Hill. 18 Jac. Sacheverel v. Sacheverel.

6. Commissioners upon a commission of rebellion, letting the party go where he listed, were *ordered to be committed till they pay the debt*. Toth. 101, 102. cites Trin. 18 Jac. Nelson v. Yelverton.

7. The defendant's commissioners for examining witnesses *met* at the time and place appointed, but *refused to join and act* in the execution of the commission; and upon affidavit made of this, the court ordered that the defendant should name other commissioners, and it was prayed that the plaintiff might *name other commissioners* too, because one of his commissioners was not there, so that it seemed to have been a practice, and the court doubted whether an *attachment* lay against the defendant's commissioners or not; et adjournatur. Hard. 170. pl. 6. Trin. 12 Car. 2. in Scacc. . . . v. Fortescue & al.

8. If a commissioner to take a *fine executes it corruptly*, he may be *fined* by the court; for in relation to the fine (which is the proper business of this court of C. B.) he is subject to the censures of it as attorneys, &c. 2 Vent. 30. Pasch. 29 Car. 2. C. B. Parrot's case.

9. If a commissioner *refuses to sit*, the suitor has no remedy by action against him, and though perhaps his refusal will be a contempt to the court if without excuse, yet doubtless they will never punish the person for it unless his reasonable *charges allowed*;

And a quantum meruit lies for serving as a commissioner upon a

commission to examine witnesses, Arg. Show. 343. Mich. 3 W. & M. Stockhold v. Collington. though it was objected that he acted by command of the court, and therefore could not take a promise of reward for the service, any more than a sheriff or bailiff; sed non allocatur; because he is appointed at the nomination of the party, who ought to pay him if he employs him. 1 Salk. 330. pl. 1. S. C. — Carth. 208. S. C. adjudged accordingly. — Show. 342, 343. S. C. & S. P. adjudged. — Comb. 186. Stockton v. Collison, S. C. but S. P. does not appear. — 12 Mod. 9. Stockwell and Collison, S. C. but not clearly S. P.

(D) Commissions granted. In what Cases, and how to be executed.

1. A Commission out of this court to prove whether a child was legitimate. Toth. 100. cites Pasch. 11 & 12 Eliz. Creley v. Hull. — Ibid. cites 22 Jac. contra, Hobby v. Smith.

2. A commission to examine witnesses on both parts upon 14 days warning, to be given to the defendants. L. one of the defendants made oath that neither he nor U. had any warning, but if any warning was given, it was given to S. the other defendant, who is little interested in the cause, but made a party as the defendant's counsel supposeth, to take away his testimony from the other defendant. Therefore ordered a commission to be awarded, whereof the said L. shall have the carriage directed to the former commissioners, and 14 days warning shall be given to the plaintiff, and he to examine if he will. Carey's Rep. 129, 130. cites 22 Eliz. Hollingworth v. Lucy, Varney and Smith.

2 And. 203,
204. pl. 20.
S. C.

3. Commissions by several warrants cannot be executed and satisfied simul & semel by one and the same inquisition, but ought to be divided and several, as the warrant is several. Poph. 94. Pasch. 37 Eliz. Pigot's case.

4. A commission was awarded to prove customs, but parties interested shall not be examined as witnesses. Toth. 101. cites 10 Jac. Hopton v. Higgins.

5. The court ordered that a commission should go forth to set out lands that lie promiscuously to be liable for payment of debts. Toth. 101. cites 14 Jac. Mullineux v. Mullineux.

6. A commission to set out copyhold land from free land which lie obscured; if the commissioners cannot sever it, then to set out so much in lieu thereof. Toth. 101. cites Mich. or Hill. 5 Car. 2. Pickering v. Kimpton.

7. Where a man is to perfect his answer on interrogatories, or to be examined for a contempt, though the rule of court is that he shall be examined in 4 days or stand committed; yet if the party be in the country, he shall have a commission to take his examination. M. 35 Car. 2. 1683. Vern. 187. Anon.

8. A commission returnable sine dilacione must be executed before the second return of the next term, if executed afterwards it is void, and the deposition ought to be suppressed. 2 Vern. 197. pl. 179. Mich. 1690. Anon.

(E) New Commissions granted. In what Cases, and how.

1. **T**HE plaintiff and defendant both *joined in commission to examine witnesses*, and the plaintiff having the carriage of the commission, did *not execute the same, but did examine witnesses here in court*, therefore ordered the defendant should have a new commission to * the former commissioners, wherein the plaintiff might also examine if he list, and at the return thereof publication; and in the mean time publication is stayed. Cary's Rep. 160. cites 21 Eliz. Mackworth v. Swayefield & al'.

2. Whereas a commission issued out *to examine witnesses* on both parties, which is returned executed, upon oath made by one G. B. that he served precepts from the commissioners upon A. B. C. and D. to be examined on the defendant's behalf before the said commissioners, who *appeared not*, it is therefore ordered that a new commission be awarded *to the former commissioners at the defendant's charge*, as well to examine the said 4 witnesses as any other. Cary's Rep. 158, 159. cites 21 Eliz. Shepherd v. Shepherd & al'.

3. A *witness* having committed a mistake in his examination before commissioners, applied himself to them to rectify it, who told him that the *commission was returned* to London, and he coming there *made oath* of it, and that he was surprized by a *hasty examination*; but the *commission not being opened it was returned back to the commissioners, with a special commission to open it, and permit the witness to rectify his mistake*; and afterwards the special commission being executed and returned, a motion was made to suppress the depositions, because unduly taken, and that no such special commission ought to have been; whereupon it was referred to the master of the rolls to examine into it, who called to his assistance the six clerks, and they were all of opinion that no such commission had ever been or ought to be now granted; so *the depositions and the special commission were suppressed*. Nelf. Chan. Rep. 92, 93. 15 Car. 2. Randall v. Richards.

Chan. Cases,
25. Randal
v. Richford,
S. C. ac-
cordingly.

4. The defendant having exhibited *writings* at a commission for examination of witnesses, suggested that they were *altered and interlined since the commission executed*, and prayed a commission to examine that point. It was objected that when the party has a commissioner present, he can never examine new interrogatories by commission. To which it was answered, that this is true as to the merits; but the matter complained of has happened since, and not examined into by the commissioners, it not being then in being, and though it was replied by asking, how the defendant could know this but by discovery of his commissioner, who ought not to discover the examination, yet the Ld. Chancellor ordered a commission. Chan. Cases, 273, 274. Hill. 27 & 28 Car. 2. Richardson v. Lowther.

5. After

Vern. 21.
pl. 13. S. C.
but S. P.
does not ap-
pear.

5. *After publication and bearing, a commission was granted to examine new matters started at the hearing, upon condition of consent to go to trial the next term (an issue being directed to be tried at law), and return the commission before the term; but the trial not to stay, though the commission should not be returned (which was to be from Barcelona) by the time; and the Ld. Chancellor directed that the commission should be delivered to Mr. Herne to send by the post to Barcelona, and when executed to receive the same back.* 2 Chan. Cases, 76. Mich: 33 Car. 2. Newland v. Horsfeman.

Curr. Canc.
243. S. P.
in totidem
verbis.

6. If either party have a commission de novo after he has been examined on a former, he *must examine on the same interrogatories as were exhibited by him on the former commission, and no other, without an order or consent of parties.* P. R. C. 221.

For more of Commissions and Commissioners in general, see Examination, Fine, and other proper titles.

(A) Commission of Rebellion.

1. **T**HE defendant made his *personal appearance* upon a commission of rebellion, for saving his bond made to the commissioners in that behalf, Cary's Rep. 82. cites 19 Eliz. Brown v. Derby.

2. Commonly it is *used to take the bonds in the name of* the ld. chancellor, ld. keeper of the great seal of England, the master of the rolls, or any two of the masters of the chancery, all which are good and allowable by the practice of the court of chancery. Cary's Rep. 83.

3. A commission of rebellion *for not payment of costs* was awarded against the defendant to one John ap David, who did thereupon apprehend the defendant, and for his more safe keeping delivered him to Thomas Moston, Esq. *sheriff* of the county of Flint, who took charge of the prisoner accordingly, and now *refuses either to deliver the prisoner to the commissioner, or to bring him himself into the court at the day.* Day is therefore given to the said sheriff to bring into this court the body of the said defendant by Thursday next, upon pain of 10 l. Cary's Rep. 150. cites 22 Eliz. Evans, Dean of St. Asaph, v. ap Rees & ap Bennet.

4. Bail may be taken on a commission of rebellion for the breach of a decree; but in case they refuse *bail*, then they ought to bring the party up to the court without delay; and for the not doing it, but keeping him in prison for 6 weeks in the house of H-
who

who arrested him, H. was ordered to the Fleet for his abuse, and to pay the defendant his costs and charges sustained by the imprisonment. Chan. Rep. 261. 15 Car. 2. Inglett v. Vaughan.

5. A commission of rebellion, by the course of the court *issues only to the sheriff of Middlesex*. 2 Wms.'s Rep. (657) pl. 206. in a note there by the editor.

For more of Commission of Rebellion in general, see *Commission and Commissioners (C)*, pl. 5, 6. and other proper titles.

(A) Commitment.

(A) Form of Commitments. How. In Cases not Criminal.

1. **T**HE *difference* where a man is committed as a criminal, and where only for *contumacy* in refusing to do a thing required, &c. for in the first case the commitment must be *until discharged according to law*, but in the latter *until he comply*, and perform the thing required; for in that case he shall not lie till sessions, but shall be discharged upon the performing his duty. Carth. 153 Trin, 2 W. & M. in B. R. The Mayor and Churchwardens of Northampton's case.

warrant, viz. *until he conforms himself to our authority, and be thence delivered by due course of law*. But upon return of an habeas corpus he was discharged, because the *conclusion was not pursuant to the Statute of bankrupts*; and the mayor of Northampton's case was cited for an authority. Carth. 153. in Marg. Bracy's case. — 5 Mod. 308. S. C. by the name of Bracy v. Harris. — The court thought the word (*conform*) instead of the word (*submit*) to be well enough, though the word in the act is (*submit*), because it is of *the same sense*; but because the commissioners had other authorities besides those of examining, and it did not appear but it might require a submission to them in other respects, and because all powers given in a strait of liberty must be strictly pursued, and that in this case they had but a *special authority*, and must not exceed it, they held the return naught. 1 Salk. 348. Mich. 8 W. B. R. Bracy's case.

So where the warrant returned of a commitment by commissioners of bankrupt, for refusing to be examined by them, was, viz. *or otherwise discharged by due course of law*, it was held naught; for the Statute is, *he shall be committed until he submit himself to be examined by the commissioners*. 1 Salk. 351. Hill. 1 Ann. B. R. Hollinghead's case.

2. Defendant was committed, upon a conviction for *deceit*, for a year, and till such time as he should be set in the pillory, whereas the act says for a year only, and therefore he was discharged, Cumb. 305. Mich. 6 W. & M. in B. R. Clark's case.

But it should be, there to remain until he shall account, as 43 El. 2. doth appoint. Carth. 152.

3. An *overserr*, who by the stat. 43 *Eliz. cap. 2.* may be committed till he account, was committed till he should be delivered by due course of law; and adjudged void, because it did not *pursue the law*. Cited per Wright Serj. Cumb. 305. Mich. 6 W. & M. in B. R. in Clark's case.

The Mayor and Church-wardens of Northampton's case.

4. Record of commitment should be *in the present tense*; per Holt Ch. J. 12 Mod. 516. Pasch. 13 W. 3. The King v. Brown.

For more of Commitment in general, see **Habeas Corpus** (F. 2) and other proper titles.

Fol. 396.

* There are only 4 manner of commons, viz. common *appendant*, *appartenant*, *in gross*, and *by reason of vicinage*; And as to common *various*, *residential*, or *commorantise*, it is not any of them; resolved by all the justices of C. B. 6 Rep. 90. a. Hill. 14 Jac. C. B. in Gatewood's case. — S. P. accordingly! Cro. E. 363. pl. 25. Mich. 36 & 37 Eliz. C. B. in case of Fowler v. Dale. — See tit. Inhabitants (B).

Admitted, arg. that the owner of the soil may feed with his tenant who has a right of common. 8 Mod. 275. Mich. 29 Car. 2. C. B.

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For by this the soil is not granted; per Brooke J. *Quod non negatur*. Br.

Common, pl. 49. (48.) cites S. C. — It was said by Coke Ch. J. that he never knew such common granted, but yet, notwithstanding such grant, the lord may common with such grantee; and also, the grantee ought to use the common with a reasonable number; and to this the lord chancellor agreed. Roll. Rep. 365. pl. 18. Pasch. 14 Jac. — If a man claims by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, cinders, or the like, this is a prescription, or custom, against the law, to exclude the owner of the soil; for it is against the nature of this word common, and it was implied in the Stat. grant, that the owner of the soil should take his reasonable profit there, as has been adjudged. Co. Litt. 322. a. (k). — See (1) pl. 5. S. C.

* Common.

(A) Common, as Lord.

[1. **T**HE lord of the manor, *seised of the wastes in which the tenants have common*, may feed the common per mic & per tout of common right, without disturbance. 18 E. 3. 43. 18 Aff. 4.]

[2. If the owner of the soil grants to another common *sans number* there, yet the grantee cannot use the common with so many cattle that the granter shall not have sufficient common for his cattle. 12 H. 8. 2.]

[3. The

[3. The lord *by prescription may agist the cattle of a stranger in the common.* 30 E. 3. 27.] It seems admitted per Cur. that the licence of the lord to a stranger to put his beasts into the common is good, if sufficient common be left for the commoners. 2 Mod. 6. Hill. 26 & 27 Car. 2. C. B. in case of *Smith v. Feverel*.

[4. *But without* prescription the lord *cannot* agist the cattle of a stranger in the common. 30 E. 3. 27.]

5. One may *prescribe* to have *sole pasturage* in such a place, from such a time to such a time, *exclusive*, of the owner of the soil. Cited Cro. J. 257. to have been so resolved in *Kenrick's case*. Cro. J. 208. pl. 1. Trin. 6 Jac. B.R. S.C. & S.P. admitted.

Yelv. 129. Kenrick v. Pargiter, S. C. & S. P. admitted. — Noy, 130. S. C. & S. P. adjudged. — S. C. cited Bull. 94.

6. If one is seised of a manor, in the waste whereof the tenants have common, and the king grants warren to the lord in such division of the manor; adjudged, that the lord cannot use his warren, and put conies in the waste in prejudice of the commoners. Jo. 12. Mich. 18 Jac. C. B. *Griffell v. Leigh*.

7. Copyholders may plead a custom to have *solam & separalem pasturam* omni anno, omni tempore anni, and that exclusive of the lord, and in such case levancy and couchancy is not necessary. 1 Lev. 2. Pasch. 23 Car. 2. B. R. *Hopkins v. Robinson*.

8. Though the copyholders have *solam & separalem pasturam, &c.* yet the lord may distrain, for other damage, the *beasts of a stranger*, who has no right to put in his beasts, though the lord has no interest in the herbage; per Hale Ch. J. 2 Saund. 328. Pasch. 23 Car. 2. in case of *Hoskins v. Robins*. For there may be trees, mines, &c. Vent. 153. 163. in S.C.

(B) Common of the Lord. *Who shall have it.*

[1.] If the lord alien in fee the soil where the common is to be taken, *saving his power of feeding as lord*, he shall have common there as lord,. 18 E. 3. 43. 18 Aff. 56. admitted.]

[2. If the lord, *without any saving*, aliens the soil where the common is to be taken, *his common as lord is gone* by the feoffment, but the alienee of the soil may feed it as the lord might have done before, for that this common is given because it is in his soil, where the lord has it, and not because he is lord, and this reason holds here. See * 18 E. 3. 30. b. 43. for it seems that they may approve it. † 18 Aff. 56. b.]

his own land, yet he had pasture there in lieu of this profit, and when he has dismisst himself, his feoffee shall have common in lieu of the pasture which he had. Adjournatur. [This may help to explain Roll, pl. 2. which seems somewhat obscure.] * The argument in the Year-book of 18 E. 3. 30. b. is, that though the lord could not have common in

18 Aff. pl. 4. S. C.

† Br. Common, pl. 22. cites

† [579]

(C) Common Appendant. What. [*And how.*]

* Fitzh. Issue, pl. 143. cites S. C. — [1.] T is not common appendant *unless* it has been appendant time out of mind. * 40 E. 3. 10. b. † 26 H. 8. 4. 17 E. 3. 26. b. 5 Aff. 2.]

† Br. Common, pl. 1. cites S. C. accordingly, and a man cannot make such common at this day, and it is appendant only to arable land, and not to the house, or any other land, and it shall be only for the beasts which feed the same land to which, &c. per Hales, to which Fitzherbert agreed. — Common appendant is to have common to his arable land, and for his beasts that plough his land, and compester his land, viz. for his horses and oxen to plough, and for his cows and sheep to compester. Br. Common, pl. 13. cites 37 H. 6. 34. — * Br. Common, pl. 16. cites S. C. & S. P. and therefore it cannot be claimed to land newly approved out of the waste. — Br. Affise, pl. 37. (36) cites S. C. & S. P.

‡ Br. Common, pl. 1. cites S. C. — [2. For such common can *not* be created at this day. † 26 H. 8. 4. § 5 Aff. 9. per Herle.]
 & S. P. and see pl. 1. supra, and the notes there. § Fitzh. Affise, pl. 134. cites S. C.

This should be 26 H. 8. [3. Common appendant *is* of common right. 26 H. 4.]
 4. — Br. Common, pl. 1. S. C. & S. P. that it is of common right before time of memory. — S. P. per Cur. 4 Rep. 37. a. in Tittingham's case, and that it commences by operation of law, is favour of tillage.

In such case [4. If the lord of a manor, before the statute of quia emptores terrarum, had made a feoffment of parcel of the manor to hold of him, the feoffee, as incident to the grant, should have had common in the wastes of the lord. Mich. 9 Jac. B. per Coke and Foster.]
 should have common in the said wastes of the lord for two causes; 1st, As incident to the feoffment, for the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture, and consequently the tenant should have common in the wastes of the lord for his beasts which do plough and manure his tenancy, as appendant to his tenancy, and this was the beginning of common appendant. The 2d reason was for maintenance and advancement of agriculture and tillage, which was much favoured in law. 2 Inst. 86. — See (G) pl. 6.

[5. Common appendant may be through all the year, saving at a certain time, at what time the lord feeds it. 27 E. 3. 86. b.]

Br. Commoner and Common, pl. 37. cites S. C. — 6. If a man grants 80 acres of land with common in 2, as much as pertains to two oxenges of land, this does not make the common to be appendant if it was not appendant before; per Herle J. & non negatur; for it seems clearly that it cannot be appendant but by time of prescription; quod nota, but contra elsewhere of appurtenant. Br. Incidents, pl. 9. cites 5 Aff. 9.
 to are all the editions, but they seem mis-printed, there being no such point there; and it should be as here, 5 Aff. 9.

7. Every common by reason of vicinage is common appendant; per Littleton J. which none contradicted nor affirmed Br. Common, pl. 30. cites 7 E. 4. 26.

[580] 8. In trespass, the defendant justified because he and all those whose estate he has in such lands, have had common appendant to the said land, in the place where, &c. with all manner of beasts, levant and couchant upon the same land, by which, &c. per Fairfax,

fax, this is common appurtenant; for if it was common appendant he shall not have *common with all manner of beasts*. Br. Common, pl. 12. cites 9 E. 4. 3.

9. The word (*pertinens*) is Latin as well for appurtenant as appendant, and therefore the *subjecta materia*, and the circumstance of the case must direct the court to judge the common to be either appendant or appurtenant; sic dictum fuit; 4 Rep. 38. a. Mich. 26 & 27 Eliz. B. R. in Tirringham's case.

10. A. seised of 2 yard-lands with the appurtenances, had common of *pasture for a certain number of cattle*; this was common appendant. Brownl. 180. Morfe v. Wells.

there is no difference when the prescription is for cattle levant and couchant, and for a certain number of cattle levant and couchant, but otherwise of common appurtenant.

11. Common appendant unto land is as much as to say common *for cattle levant and couchant upon the land in which*, &c. Resolved. 13 Rep. 66. Hill. 7 Jac. C. B. Morfe v. Webb.

Co. Litt.
121. b. 3.
P.

13 Rep. 65.
66. Hill. 7
Jac. C. B.
S. C. re-
solved that

(D) The several Sorts [of Common Appendant].

Fol. 37.

[1. A Common appendant may be *upon condition*. 37 H. 6. 34. (it seems to be intended limited.)]

100 acres when it is not sown, this is conditionally. Br. Common, pl. 13. cites S. C. per Moyle. — Fitzh. Trespass, pl. 85. cites S. C.

As where a
man had
common in

[2. Common appendant may be *unlimited*, so *quandiu he pays so much*, so *tandiu as he shall be living upon such a house* to which the common is appendant. 37 H. 6. 34.]

Trespass, pl. 85. cites S. C.

Br. Com-
mon, pl. 13.
cites S. C.
— Fitzh.

[3. So, common appendant may be to common, *after the corn is severed, till it is re-sowed*. 17 E. 3. 26. F. N. 180. E. 37 H. 6. 34.]

Br. Com-
mon, pl. 13.
cites S. C.
& S. P.
implied. —

A man *prescribed* to have common appendant in the place where, &c. for all cattle commonable, &c. (viz.) *if the land was sowed by the consent of the commoner*, then *he was to have no common till the corn was cut*; and *then to have common again till the land was sowed by the like consent of the commoner*; it was objected that this prescription was against common right, for it was to prevent a man from sowing his own land without the leave of another; but the whole court held the prescription good, for the owner of the land cannot plough and sow it where another has the benefit of common; but in this case both parties have a benefit, for each of them have a qualified interest in the land. 1 Le. 73. pl. 100. Mich. 29 & 30 Eliz. C. B. Hawkes v. Mollineux.

[4. So it may be to common in the meadow *after the hay carried till Candlemas*. 17 E. 3. 26. 34.]

[5. So it may be to common in the *pasture from the feast of St. Augustin till All-Saints*. 17 E. 3. 26. b. 34.]

[6. So it may be to common *between the said feasts* before mentioned; and *if the tertenant puts in his cattle before the feast of St. Augustin*, then *he may common there also from the Invention of the Holy Cross till All-Saints*. 17 E. 3. 26. 34.]

[7. So it may be to common *2 years after the corn cut and carried away, till it is re-sowed, and every 3d year; per totum annum*. 22 Aff. 42. admitted.]

[8. A

[581]

[8. A man may have common appendant for 30 cattle in one place, and to the same land common appendant also in another place, for part of the said cattle, and so may take it where he pleases. 17 E. 3. 34. b.]

(E) To what it shall be appendant.

* Br. Common, pl. 13. [1.] T ought to be appendant to arable land. * 37 H. 6. 34. cites S. C. † 26 H. 8. 4.]

———† Br. Common, pl. 1. cites S. C. ——— F. N. B. 180. (B) in the marg. of the new edition, [419.] cites S. P. by Priſot, 20 H. 6. 4. and by Hulls accordingly, 5 Aff. 2.

Br. Common, pl. 1. [2. Not to other land than arable. 26 H. 8. 4. Not to a house. 26 H. 8. 4.] cites S. C.

and both the same points. ——— It is only appendant to ancient arable land hide and gain; per Cur. 4 Rep. 37. a. Mich. 26 & 27 Eliz. B. R. in Tiringham's case.

It is against the nature of common appendant to be appendant to meadow or pasture, and therefore in the principal case, the prescription being laid to have common appendant time out of mind, to a house, meadow, and pasture, as well as to arable land, by which it appeared to the court that there had been a house, meadow, and pasture, time out of mind, it was resolved for that reason, that this was common appurtenant and not appendant; but if a man has had common for beasts which serve for his plough, appendant to his land, and perhaps of late time a house is built upon part thereof, and some part is employed to pasture, and some for meadow, and this for maintenance of tillage, which was the original cause of the common, in this case the common remains appendant, and it shall be intended in respect of the continual usage of the common for beasts, levant and couchant upon such land that at first all was arable; but in pleading he ought to prescribe to have it to the land. 4 Rep. 7. a. b. in S. C. per Cur.

Br. Common, pl. 16. [3. It cannot be appendant to land which is approved within time of memory out of the waste of the lord. 5 Aff. 2.] cites S. C.

——— Br. Affise, pl. 117. (116.) cites S. C. ——— F. N. B. 180. (B) in the marg. of the new edition, 419. cites S. C. and 10 E. 2. accordingly, and there the land to which it may be appendant is called *aid* [hide] and gain. ——— 4 Rep. 37. b. S. C. cited per Cur.

[4. Common of turbary cannot be appendant to land. 5 Aff. 9. Ad. [admitted.]

5. The lord may have in the land of his tenant common appendant to his own demesnes; per Green. F. N. B. 180. (D) in the new notes there (d) cites 18 E. 3. Admeasurement, 7.

6. A man may prescribe to have common appendant to his manor; for all the demesnes shall be intended arable, or at least, in construction of law (*reddendo singula singulis*), shall be appendant to such demesnes as are ancient arable land, and not to land newly gained and improved out of the wastes and moors, parcel of the manor; per Cur. 4 Rep. 37. b. Mich. 26 & 27 Eliz. B. R. in Tiringham's case.

7. Common may be appendant to a carve of land, and yet a carve of land may contain meadow, pasture, and wood, as is held 6 E. 3. 42. but it shall be applied to that which agrees with the nature and quality of a common appendant, and no incongruity appears; per Cur. 4 Rep. 37. b. Mich. 26 & 27 Eliz. B. R. in Tiringham's case.

8. A man prescribed for common for all commonable beasts to his house appertaining, and in arrest after verdict the court said, that upon demurrer it might perhaps have been ill; but after verdict,

dict, *though it be neither appendant nor appurtenant, &c. in strictness of law*, yet it is good enough, and they ought to intend it appurtenant, and judgment for the plaintiff. 2 Sid. 87. Trin. 1658. Stoneby v. Muffenden.

9. A prescription for common for all cattle, levant and couchant, as appendant to *his cottage*, was held a good prescription, by Holt Ch. J. and the court; and by Powell J. a *cottage contains a curtilage*, and so there may be a levancy and couchancy upon a cottage, and it has been so settled, and there is no difference between a messuage and a cottage as to this matter; the statute de extentis manerii says, that a cottage contains a curtilage, and that they will suppose that a cottage has at least a court to it. 2 Ld. Raym. Rep. 1015. Hill. 2 Ann. Emerton v. Selby.

1 Salk. 169. pl. 2. S. C. held accordingly; and Holt Ch. J. said he remembered the trial of an issue whether levant and couchant before Hale Ch. J. 6 Mod. 114.

who held the *foddering of the cattle in the yard evidence of levancy and couchancy*. Anon. S. C. and the court held, that a *cottage implies a court and backside*.

(F) [Appendant.] For what Cattle.

[1. **I**T ought to be for *such cattle as plough his land, (to which it is appendant, as it seems,) and compester it*, scilicet, horses and oxen to plough the land, and cows and sheep to compester it. * 37 H. 6. 34. 10 E. 4. 10. b.]

* Br. Common, pl. 13. cites S. C. — Ibid. pl. 1. cites 26 H. 8. 4.

that it shall be only for such beasts as compester the same land, &c. — Co. Litt. 122. a. S. P. — S. P. per Cur. and same cases cited 4 Rep. 37. a. in Tyrringham's case.

[2. But he shall *not* use it *with goats, geese, or such like*, for these are not necessary to do ut supra. 37 H. 6. 34.]

Br. Common, pl. 13. cites S. C.

for these are not necessary to plough his land, or to seed it. — Fin. Law, 8vo. 56. S. P.

[3. And *therefore a prescription to have common appendant for all manner of cattle is not good*, because it comprehends goats, geese, and such like; but this is common appurtenant. † 37 H. 6. 34. b. per Curiam. Contra † 4 H. 6. 6. b.]

† Br. Common, pl. 13. cites S. C. that where a man claims common for

all manner of beasts, he may put in hogs, goats, and the like.

† See (M) pl. 2. which seems to be the case intended here, and that it should be 14 H. 6. 6. as it is there.

4. In assise, the plaint was of *common with all manner of beasts*; Fisher said, that goats and geese are not beasts of common; judgment of plaint; & non allocatur; the reason seems to be, because it shall be *intended beasts which are commonable*. Br. Common, pl. 42. cites 25 Ass. 8.

5. A man cannot have common for beasts in which he has not a *general or special property*. 2 Show. 329. pl. 337. Mich. 35 Car. 2. Manneton v. Trevillian.

(G) Common. [Common Appendant.] *For how many Cattle.*

Br. Com-
mon, pl. 13.
cites S. C. &
S. P. as to
the quantity.

[1. **T**HE common is admeasurable, according to the quality and quantity of the freehold to which he claims to have this common appendant. 37 H. 6. 34.]

Fol. 398.

[2. Scilicet, for all those which are *levant and couchant* upon the land. 10 E. 4. 10. b. * 15 E. 4. 32. b. 11 H. 6. 12.]

* Br. Common, pl. 8. cites S. C.

See (1) pl. 4.
S. C. For
there is no
difference
between this
and common

[3. He that *claims common by force of a prescription, as an inhabitant* of a town, shall have no other cattle to common there but what are *levant and couchant* within the same town. 15 E. 4. 32. b. Curia.]

appendant; for he who has common appendant to an acre of land, shall not use the common with other beasts but those which are *levant and couchant* upon the said acre; per Pigot, with which agreed the opinion of the court. Br. Common, pl. 8. cites 15 E. 4. 32.

[4. Common appendant may, by *usage*, be limited to any certain number of cattle. 17 E. 3. 27. 34. b.]

Brownl. 17.
Hill. 14 Jac.
Coles v.
Flaxman,
seems to be
S. C. but
S. P. does

5. So many cattle as the land, to which the common is appurtenant, may maintain in the winter, so many shall be said *levant and couchant*; it was reported by Serj. Attee to have been so said by Coke Ch. J. at Norfolk assizes, and to this Warburton and Hutton agreed. Noy, 30. in case of Cole v. Foxman.

not appear. — Sleep *levant and couchant*, is intended as many as the land will maintain. Vent. 54. Hill. 21 & 22 Car. 2. — Prescription for all beasts *levant and couchant* upon a house, shall be intended those beasts which are nourished and fed upon the land, and may there lie in summer and winter. Agreed. But some thought that beasts cannot be *levant and couchant* upon a house without a curtelage. 2 Brownl. 101. Mich. 9 Jac. C. B. in case of Patrick v. Lowre.

M. S. Rep.
Mich. 14
Geo. 2.
C. B. Ben-
net v. Reeve
& al'.

6. In replevin the plaintiff declares for taking 64 sheep in a place called Somer-lees in the parish of D. in Somersetshire. The defendants avow the taking, for that the place where, &c. contains 100 acres of land; that at and before the taking Rich. Bowes was seised in fee, &c. and that the cattle were damage-feasant, and that they distrained them as his bailiffs. The plaintiff in bar to this avowry pleads, that long before and at the time when, &c. one Philip Biggs was seised in fee of a certain acre of land called Old Hafter, situate in D. and that he, and all those whose estate he hath, have used to have a right of common for all manner of sheep, &c. as appendant to the said acre; and that the said Biggs being so seised on the . . . day of . . . 5 W. 3. made a demise to J. S. for 99 years, if 3 lives so long lived; and that afterwards in 1704, J. S. made an under-lease to the plaintiff's father Robert Bennet for the residue of the term, who entered and was possessed, and afterwards died, leaving the plaintiff his executor, who thereupon, as such, entered, and then avers that the lives are still

kill in being; and the said plaintiff being so possessed upon the 28th of Sept. 1737, (being the day of the supposed taking,) did put his cattle in the said place to depasture, and enjoy the common as appendant to the said acre; and that while they were so depasturing the defendants seized them, and this he is ready to verify. The defendants reply, *protesting as to the common, * and say that before and at the time of the taking, the said sheep nor any of them were not levant or couchant on the land.* To this the plaintiff demurs; and the defendants join in demurrer. Per Cur. the single question upon this demurrer is, *whether levancy and couchancy is incident to common appendant as well as to common appurtenant?* If it be incident, then the plaintiff having by his plea in bar set forth that they were levant and couchant, the defendants' replication has put a material matter in issue, and the demurrer must be over-ruled. Whether the plaintiff was bound to have pleaded levancy and couchancy is another question, and might be very doubtful; but that is not now necessary to be determined, supposing the defendants' replication material, as we think it is. So likewise as to some other objections which have been made to the defendants' plea, I shall pass them over as of no great weight. And as to the point in question, I think it could never have been made a doubt at the bar, and the nature and original of common appendant been rightly understood. It was said that *common appendant took its rise* from hence, that tenants of manors being by their tenure obliged to plough and till the lord's land, therefore they had the liberty of putting their cattle to be maintained in the lord's waste, as they were to be employed in his service. But I think that this opinion is a mistake, and not warranted either by law or reason, and that were it to prevail, it would be attended with the utmost absurdity and inconvenience. I admit that common appendant is incident only to arable land; so is Co. Litt. 122. b. and so are all the books as to this point, though in other matters of common appendant they differ widely. Therefore as it is incident, it cannot be severed from the land, and then the consequence of that will be, that if land be divided into never so many parts or parcels, the tenant of each distinct parcel has a right to such common as appendant to the land, in the same extent and degree as the tenant of the whole land had before the tenancy was divided; and so every tenant of the manor must keep the same number of horses or oxen to plow and cultivate the lord's land, and on that account to feed them on the waste, whether he be tenant of 100 acres or only of a single acre, which shews the absurdity of such an opinion, and has fell out to be the very case at present. There is another answer to be given against that opinion; and that is, that a man may have common appendant for cows and sheep as well as horses and oxen, as appears by 1 Roll. Abr. 397. and several other books, and was admitted by the plaintiff's counsel very rightly; because else, this being a replevin for sheep, they would have made an end of their own case. But if there may be common appendant for sheep, then such common can never be enjoyed upon account of keeping them to plow the lord's land,

because they are not capable of been used in that manner But I take this to be the true reason, that every tenant had a right to this common for his own benefit, and that as he had no place for keeping his cattle after they had done ploughing his land, he might turn such cattle as were employed by him that way, upon the waste of the lord, till the hay or corn was cut and the ground cleared; and this appears to be the case in Co Litt. 122. before cited, and seems to be a clear and intelligible account of the matter. For if this account be true, that it was a right of common for such cattle as were employed in ploughing the tenant's land, then it can extend to such only as are levant and couchant on it. And there will be no absurdity as in the former case; for then if the land be divided into parcels, the common will be divided into parcels likewise; and a tenant of one acre of land will never be able to claim common for 64 sheep, as in the present case, because the original tenant (perhaps) of 1000 acres had a right to it. The consequence of this will likewise be,

[585] that a tenant shall not be at liberty to borrow a stranger's cattle and put them on the common, at least unless borrowed for a considerable time, so as to be employed, and be levant and couchant on the tenant's own land at other times. Having thus explained the nature and origin of common appendant, it becomes a very plain case for the defendants; but I will just add a case or two in confirmation of our opinion, though I think the case does not need it; and that is 4 Co. 38. b. and 1 Roll. Abr. 398. with several year-books there cited, all to prove that common appendant is only for cattle levant and couchant on the land, for the reasons I have before mentioned. Therefore we are all of opinion that there must be judgment for the defendants.

(H) By the Cattle of whom it may be used.

- He that has common appendant cannot use it but with his own proper beasts, or beasts that compester the land to which the common is appendant; but he who has common for 20 beasts by grant, or for beasts *fixis* number, may use it with the beasts of another; but contra where he has a grant of common *pro 20 averiis suis*, or common *sans nombre pro averiis suis*; per Paston, *quod non negatur*. Br. Common, pl. 48. (47) cites 11 H. 6. 22.—Fitzh. Common, pl. 3. cites S. C.
- † Br. Common, pl. 41. (40) cites S. C.—Fitzh. Affise, pl. 228. cites S. C.
- ‡ Br. Common, pl. 5. cites S. C.—Br. Scilun, pl. 5. cites S. C.
- ¶ Br. Common, pl. 14. cites S. C.—Fitzh. Trespass, pl. 33. cites S. C.
- A man cannot use his common appendant with the cattle of strangers, unless he brings them to soil his land; but he cannot agist other cattle there for money, which do not manure his land. F. N. B. 180. (B) cites 6 H. 7. 4. 45 E. 3. 25.—Ibid. in the new notes there (a) cites these diversities as agreed 11 H. 6. 22. in *Surede's case*, and 14 H. 6. 6. and refers to Raym. 171. *Rumsey v. Rawdon*.

[3. He

[3. He cannot *agist* the cattle of a stranger. * 11 H. 6. 22. b. * Br. Common, pl. 48. 11. b. ‡ 22 Aff. 84.]

S. C. — Fitzh. Common, pl. 3. cites S. C. — Fitzh. Affise, pl. 228. cites S. C. — F. N. B. 180. (B) S. P. accordingly. — Year. 18. Pasch. 21 Car. 2. B. R. Rumfey v. Rawson, S. P. held accordingly; but after verdict in replevin found for the plaintiff, that the beasts were levant and couchant, the court shall intend they were beasts which were procured to compester the land, and the right of the case is tried, and so aided by the statute of Oxford. — Raym. 171. S. C. — 2 Keb. 304. pl. 72. S. C. The court agreed that a man cannot put in the beasts of a stranger, but only to compester his land.

[4. If he takes the cattle of a stranger to fold, and folds them accordingly, being levant and couchant upon the land, he may use the common with these cattle; for he has a special property in them for the time. Mich. 10 Car. B. R. between JASON AND HELL-YARD, per Curiam, upon evidence at the bar.]

(I) Common fans Number. [*How it may be, and how used.*] [586]

[1.] F a man as an inhabitant of a town claims common for all manner of cattle in a place, and claims the common by reason that he is an inhabitant there, he shall have no other beasts to common there but those that are levant.] Br. Common, pl. 8. cites 15 E. 4. 32. S. P. by Pigot. — See pl. 4.

[2. A man may prescribe to have common for all manner of cattle, by reason of his person. 15 E. 4. 33.] Br. Common, pl. 8. cites 15 E. 4. 32. but that is as to an inhabitant's claiming common.

[3. If a man claims common by prescription for all manner of commonable cattle in the land of another, as belonging to a tenement, this is a void prescription, because he does not say that it is for cattle levant and couchant upon the land to which he claims it to be appurtenant; for a man cannot have common fans number appurtenant to land, and when he claims the common for all cattle commonable, and does not say for cattle levant and couchant upon the tenement, this shall be intended common fans number according to the words; for there is not any thing to limit it, when he does not say for cattle levant and couchant. Pasch. 16 Car. B. R. between COBHAM AND WHITE, adjudged in a writ of error upon a judgment in Windsor-court, and the judgment there given reversed for this cause, the Lord Brampton only being in court. Intratur M. 14 Car. Rot. 403, 404.] Mar. 83. pl. 137. Pasch. 17 Car. B. R. cites it as adjudged in Say's case of the county of Lincoln, that such prescription was not good, but saying levant and couchant would make it a good prescription. — Lev. 196. Mich. 18

Car. 2. B. R. Cheadle v. Miller, S. P. and adjudged ill without special demurrer; but agreed that it was cured by verdict, and cited it as adjudged 14 Car. 1. in the case of *Ld. Say v. Young*, though it was doubted in case of * *Stone v. Muffleton*. — Sid. 313. *Cheadley v. Mellor*, S. C. adjudged, and cites the case of *Say v. Young*.

* 2 Sid. 87. Trin. 1658. B. R. *Stoneby v. Muffenden*, S. C. — S. C. cited Mod. 7. as the case of *Muffelden v. Stoneby*, where *Muffelden* prescribed for common fans number, without saying levant and couchant, and that being after a verdict, was held good; but if it had been given upon a demurrer, it would have been otherwise; cited by *Twifden*, and *Livesey* said that he was agent for him in the case. — S. P. cited as cured by verdict, 3 Mod. 162. — Mod. 75. pl. 31. *Twifden* J. cited *Stoneby v. Muckleby*, S. C. & S. P.

Br. Common, pl. 8: cites S. C. — For he who has common appendant to one acre of land, shall

not use this common but with beasts which are levant and couchant upon the same acre. And so where inhabitants in a place have common, the house in which the inhabitant inhabits is the cause of his common, and therefore the beasts levant and couchant there shall be put into the common, and no others; per Pigot, and so was the opinion of the court. Br. Prescription, pl. 28. cites S. C. — S. C. cited Arg. Cro. E. 363. in pl. 25. — Inhabitants of a town may well prescribe. 3 Le. 202. pl. 254. Arg. cites 18 E. 4. 3. — 4 Le. 235. pl. 369. Arg. S. P. and cites S. C. — Ld. Raym. Rep. 406. Arg. cites S. C. — See Cro. E. 362, 363. pl. 25. Mich. 36 & 37 Elis. C. B. Fowler v. Dale.

• See tit. Inhabitants (B). — See tit. Prescription.

[5. If a man grants common fans number, the *grantee* cannot put in *so many* cattle, but so that the grantor may have sufficient common in the same land, 12 H. 8. 2. per Newport.]
 Fol. 399. For by this the soil is not granted. Br. Common, pl. 49. (48) cites S. C. per Brooke J. quod non negatur.

[587] 6. Common fans number *cannot be appendant to any thing but lands*, and it is called common fans number, because it is *only for beasts levant and couchant*, and it is uncertain how many those are, there being in some years more than in others; but it is a *common certain in its nature*; for id certum est, quod certum reddi potest; per Cur. Hard. 117, 118. pl. 3. Trin. 1658. in Scacc, Chichley's case.

7. In case of common fans nombre, if there be a *sur-charge*, it *may be remedied by a writ of admeasurement*; agreed, per Cur. 2 Ld. Raym. Rep. 1187. Trin. 4 Ann. in case of Follet v. Troake.

(K) Common by Reason of Vicinage. [And Pleadings.]

S. P. by Wray Ch. J. [1. If there be a common by reason of vicinage between two manors time out of mind, &c. yet one may inclose against the other. Co. Lit. 122.]
 4 Rep. 38. b. Mich. 27 & 28 Eliz.

D. R. in Tittingham's case. — And ibid. 38. b. the reporter cites S. P. as lately adjudged in B. R. in the case of Smith v. How accordingly, though it was objected, that having been used by prescription time out of mind, it would be hard to break what had been of such long continuance; and it might be that the waste of the one was larger or of greater value than the waste of the other, and it might be that those who at first had the least, gave a recompence to have common in the greater, and therefore it would be unreasonable now to inclose; but it was answered and resolved, that the prescription imports the reciprocal cause in itself, viz. for cause of vicinage, and no other cause can be imagined; and it is rather an excuse of trespass, when the beasts of the tenants of one manor stray into the waste of the other, than any certain inheritance. — They may inclose the one against the other; per Powell J. 11 Mod. 73. pl. 3. Pasch. 5 Ann. in case of Bromfield v. Kirker.

[2. If there be common pur cause de vicinage between two manors, and the lord of one manor incloses, yet it shall not bind a copyholder of the same manor, but that he may have common pur cause

cause de vicinage as he had before. Mich. 13 Jac. Banco per Hubert.]

[3. [But] If there be common pur cause de vicinage between two manors, and the lord of one manor incloses any part of his common, the *common pur cause de vicinage is gone*. M. 13 Jac. Banco per Hubert.]

[4. Where there is common pur cause de vicinage between two, yet *one cannot put his cattle into the land of the other*, but they ought to escape thither of themselves by reason of the vicinity; for this is *but an excuse of the trespass*. Co. Lit. 122.]

S. P. by Wray Ch. J. 4 Rep. 38. b. in Tiringham's case; and

ibid. the reporter cites S. P. then lately adjudged accordingly in B. R. in case of Smith v. How & Redman. — S. P. by Powell J. 11 Mod. 72, 73. pl. 3. Pasch. 5 Ann. B. R. in case of Bromfield v. Kirber.

[5. Every common pur cause de vicinage is a common appendant. 7 E. 4. 26. per Lit. Br. Commoner, 29.]

Br. Commoner, &c. pl. 30. (29)

cites S. C. and says quod nemo dedit neque affirmavit. — Wray Ch. J. said that common for cause of vicinage is not common appendant, but in as much as it ought to be by prescription as common appendant ought, it is in this respect resembled to common appendant. 4 Rep. 38. a. in Tiringham's case.

[6. A man need not prescribe in a common pur cause de vicinage, but it is sufficient to say that he and all those whose estate, &c. have used to intercommon causa vicinagii, because this is common appendant. * Old Books of Entries, Trespas in Common, 11. (but quære this) and fee 13 H. 7. 13. b. a prescription for common pur cause de vicinage.]

Prescription was, that all occupiers of B. tabuerunt & habere consueverunt common in such a down in

C. ratione vicinagii, without alleging time out of mind. The court held the pleading ill, because the prescription is the ground for the common by vicinage, but it is otherwise where one claims common appendant, for in such case the alleging a prescription would make the plea double. Lat. 161. Trin. 2 Car. Jenkyn's case. — Poph. 201. Jenkin v. Vivian, S. C. & S. P. agreed. — See D. 47. b. pl. 13. Trin. 32 H. 8. Anon.

* [588]

7. Assise of common in A. appendant to his frank-tenement in B. The defendant said that A. & B. do not intercommon, judgment if for common appendant, &c. and a good plea, by which the plaintiff prescribed in common there, and the other e contra, and so see that issue may well be taken upon prescription in assise. Br. Common, pl. 43. cites 30 Ass. 42.

8. Note, that it is no prescription in trespass of trampling his grafs in D. that H. is lord of the vill of S. which is adjoining to D. and that H. and all the lords of the vill of S. have had common by reason of vicinage in the vill of D. for their frank-tenements for term of life, of years, and at will, and that the defendant held 12 acres in S. of the said H. for term of life, by which he put his beasts in D. to use the common as lawfully he might, judgment si actio and no prescription; for by this word lord shall be intended him, of whom the vill is held, and not he who is seised of the vill; for if there be 20 mesnes every one of them is lord of the vill, and yet none shall have common but he who is seised in possession of the vill, by which he said that H. is seised of the vill of S. and that he and all those whose estate he has in S. &c. have had common

Br. Common, pl. 7. cites 22 H. 6. 10. 43.

common for cause of vicinage time out of mind for him and his frank-tenants of the said manor for term of life, of years, or at will in the vill of C. and pleaded all as above, &c. Br. Prescription, pl. 27. cites 22 H. 6. 51.

* So are the English editions, they copying after one another, but the French edition is, viz.

9. *None shall claim common by vicinage but the lord who has the possession of the town.* 23 H. 6. But yet it seems that one neighbour may claim common by vicinage in the land of another neighbour, * although he be lord of the town, &c. F. N. B. 180. (D).

though neither of them be lord of the vill, &c.

S. P. by
Manwood
J. D. 316.
b. pl. 4.
Mich. 14 &
15 Eliz.

10. Of common by reason of vicinage, the one cannot put his beasts into the land of the other; for there those of the other vill may distrain them damage-feasant, or shall have action of trespass, but they shall put them in their own fields, and if they stray into the fields of the other vill, they ought to suffer them. Br. Common, pl. 55. cites 13 H. 7. 13.

11. *And the inhabitants of the one vill should not put in more beasts, but having regard to the frank-tenements of the inhabitants of the other vill.* Ibid.

12. A great field lies between 2 adjoining vills, and one that has land in the one vill has common there with the tenants of the other vill. The question was, if he be to make title to this common, whether he shall make it as to common appendant, or by reason of vicinage? Per Cur. this is common by reason of vicinage. D. 47. b. pl. 13. Trin. 32 H. 8. Anon.

13. If there are 3 vills, D. S. and V. and S. lies in the middle between D. and V. the vills of D and V. cannot intercommon by reason of vicinage, because they are not vicini adjacentes; per Shelly. But Bauldwin e contra, and took a difference where one vill has common in another vill in one season of the year, and the other has common in the other vill in another season of the year, or every 2d year; this is not common by reason of vicinage, inasmuch as they do not intercommon at one and the same time, but at several times. D. 47. b. 48. a. pl. 14. Trin. 32 H. 8. Anon.

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14. If the commons of the vill of A. and B. are adjacent, and that the one ought to have common with the other for cause of vicinage, and the vill of A. has 50 acres, and the vill of B. has 100 acres of common, the inhabitants of A. cannot put more beasts into their common than their 50 acres will depasture, without having any respect to the common of B. nec e converso; the original cause of this common being not for profit, but for preventing of suits for mutual escapes; and therefore if the vill of A. puts in 50 beasts, and the vill of B. 100, here is no prejudice to either, if the beasts of the one escape into the common of the other. Resolved. 7 Rep. 5. b. Hill. 27 Eliz. in Scacc. Sir Miles Corbet's case.

15. Common for cause of vicinage must be next adjoining, but it may be in several manors; per Holt Ch. J. 11 Mod. 72. pl. 3. Patch. 5 Ann. B. R. Bromfield v. Kirber.

16. If a man goes into the common of vicinage to drive his cattle off into his own common, (for he ought not to keep them in the common of vicinage,) he may justify this trespass; but if they go

into a third common, such excuse, perhaps, will not hold; per Holt Ch. J. 11 Mod. 72. pl. 3. Pasch. 5 Ann. B. R. Bromfield v. Kirber.

17. In pleading this kind of common it ought to be *pleaded mutual*; per Holt Ch. J. 11 Mod. 73. pl. 3. Pasch. 5 Ann. B. R. in case of Bromfield v. Kirber.

(L) Common Appurtenant. *What is.*

[1.] F a man hath time out of mind had common of *estovers* in a certain place, to be burnt in such a house, and to mend the old houses and old hedges, this is not common appendant but appurtenant. 11 H. 6. 11. b.]

[2. If a man and his ancestors, and all those whose estate he hath in a house, have had common for two beasts in a certain place, this is not appendant, but appurtenant. 11 H. 6. 12.]

[3. If a man bargains and sells Black-acre to B. and after, before the deed is inrolled, by another deed grants a common to the said B. for all his cattle which should manure and feed in the said Black-acre, which he hath bargained and sold to the said B. or the which he hath mentioned to be bargained and sold, and after the deed is inrolled, this is a good common appurtenant to the said Black-acre, although the grantee had nothing in the said land, at the time of the grant, and though it be admitted that it shall not relate to settle the estate in him ab initio, inasmuch as this has reference to the bargain and sale, and to the estate which he had by force thereof. Mich. 15 Jac. B. R. between GAWEN AND STACY, agreed per Curiam.]

Roll. Rep. 424, 425. pl. 16. S. C. argued, sed adjournatur. Godb. 270. pl. 377. Ludlow v. Stacy, S. C. adjudged a good grant of the common; and that the inrolment shall have relation as to that, though for collateral things it shall not have relation.

[4. So if a man grants a common to another for all his cattle, which should be levant and couchant, upon the land which he should purchase (*) within a month after, and after he purchases certain land, this is a good common appurtenant to this land, though he had nothing in this land at the time of the grant, inasmuch as the grant had reference to this which he should purchase; for it is not necessary that he should have the land at the time of the grant. Mich. 15 Jac. B. R. between GAWEN AND STACY, agreed per Curiam.]

[5. So if a man bargains and sells Black-acre to B. and after, before the deed is inrolled, by another deed, grants a common to the said B. for all the cattle which should manure and feed in the said Black-acre, and after the deed is inrolled, this shall be a good common appurtenant to the said Black-acre, though the grant has no reference to the said bargain and sale, inasmuch as the grantee had a possibility and inception of an estate, and an use in the said acre at the time of the grant, and it seems that this shall relate for the possession sufficiently to support this grant, for he need not have so full an interest in this land to annex the common to it. Mich. 15 Jac. B. R. between GAWEN AND STACY, adjudged per totam Curiam, upon a special verdict, and the court said it should be so without any help of relation.]

• Fol. 400.

[590]

[6. If

[6. If a man grants to B. common for all his cattle which manure Blackacre, where he has nothing in Blackacre, and after he purchases it, this shall be a good common appurtenant to this acre, though he had nothing in it at the time, nor the grant hath reference to any purchase after, for this shall be a good grant upon a contingent, scilicet, if he purchases the land; so that this is as much as if he had said, that he should have the common quandocunque he shall have the land. Mich. 15 Jac. B. R. between GAWEN AND STACY, per Curiam, and the principal case was adjudged upon this reason. (But *quare*, inasmuch as the grant had no reference to a future purchase.)]

Cro. C. 482. [7. In 2 H. 4. A. was seised in fee of a waste called Wittenball-
pl. 5. S. C. Heath in C. and the prior of Stone was seised in fee of certain mes-
adjudged ac- suages, lands, meadow, and pasture in S. and they being so seised,
cordingly, A. by deed dated 2 H. 4. grants to the said prior and convent common
and though afterwards only part of the land was conveyed by the grantee of the crown to the de-
pendant, and not the in-
tire, yet it is common appurtenant as common for the beasts levan: and couchant upon the said tene-
ments, and may well pass with them by the words cum pertinentiis; and though it be common created within time of memory, yet it is common appurtenant, and may be apportioned. — Jo. 396.
pl. 5. S. C. adjudged.]

Fitzh. Aff. [8. If a man grants to another *quandam affartam cum communis*
life, pl. 134. *turbarie quantum pertinet ad duas bovatas terre cum pertinentiis*
cites S. C. in D. this is a common in gross, being a grant de novo, not by prescription, and not appurtenant to the said affart. 5 Aff. 9. adjudged.]

9. Common for all manner of beasts is common appurtenant. Br. Common, pl. 13. cites 37 H. 6. 34.

[591] 10. Common appurtenant may be made at this day, and may be severed from the land to which it is appurtenant. Br. Common, pl. 1. cites 26 H. 8. 4.

11. If a man grants common appurtenant to such a close, it is good, and shall pass by grant of the close; for common appurtenant may be created at this day. 2 Sid. 87. Trin. 1658. B. R. in case of *Pretty v. Butler*.

(M) Common Appurtenant. How it may be. Fol. 301.
 [And for what Cattle.]

[1. IF a man prescribes to have common of *estovers to his freehold*, scilicet, a house, he *cannot prescribe to sell* the wood, for this cannot be appurtenant. 11 H. 6. 11. b.]

A prescription to take estovers for the building of new

houses, as well as to repair old houses, was held good by all the court, præter Williams, who said, that then the defendant might cut down all the wood and destroy it; but, notwithstanding, it was adjudged for the defendant. Cro. J. 25. pl. 1. Paich. 2 Jac. B. R. Arundel (Countess of) v. Squire.

[2. A man may prescribe to have common appurtenant to a *manor for all manner of cattle*. 14 H. 6. 6. b. It seems to be intended of common appurtenant; but there this is called appendant, which cannot be.]

Br. Common, pl. 14. cites S. C. Fitzh. Trefpals, pl. 33. cites S. C. —

A man prescribed to have common appendant for all manner of beasts, and it was held that it could not be common appendant, because that is only for those cattle which manure his lands. F. N. B. 180. (B) in marg. of the new edit on [419] cites 9 E. 4. 3. 37 H. 6. 34. and 14 H. 6. 6. but it is common appurtenant. Old N. B. 26.

[3. So a man may prescribe to have common appurtenant to his *freehold* for all manner of cattle. 25 Aff. 8. But this is there called appendant, but it seems to be intended appurtenant.]

Br. Common, pl. 42. (41) cites S. C. but S. P. does not appear.

[4. A man may prescribe that he, and all those whose estate he hath in the manor of D. have used to have a *fold-course*, scilicet, *common of pasture for sheep, not exceeding 300, in a field*, (scilicet, *Cane-field*, as the case was in Norfolk,) as appurtenant to the said manor, though he does not prescribe to have them levant and couchant upon the said manor, there being a certain number limited. Mich. 11 Car. B. R. between DAY AND SPOONER, in a writ of error, agreed per Curiam. Intratur Mich. 6 Car. Rot. 183. and Hill. 11 Car. adjudged accordingly.]

Cro. C. 432. pl. 2. Spooner v. Day, S. C. but S. P. does not appear. — Jo. 375. pl. 1. S. C. but S. P. does not appear. — It was ruled by Holt Ch. J.

at Dorchester Lent-assises, 10 W. 3. at a trial at nisi prius, that if a man prescribes for common for a *certain number of cattle as appurtenant, &c.* it is not necessary nor material to *show* that they were *levant and couchant*, because it is no prejudice to the owner of the soil, for that the number is ascertained. Id. Raym. Rep. 726. Richards v. Squibb.

[5. A man may prescribe to have common appurtenant for his cattle not commonable, as *hogs, goats, and such like*. Co. Litt. 122.]

Br. Common, pl. 13. cites 17 H. 6. 34. S. P. — See pl. 10.

[6. [So] a man may prescribe to have common appurtenant to his freehold for all manner of cattle, at every season in the year. 25 Aff. 8. adjudged.]

[592]
 Br. Common, pl. 42. (41) cites S. C. & S. P.

as to all manner of cattle; but says nothing as to every season of the year.

[7. A man may prescribe to have common appurtenant for *hogs levant and couchant upon such land*. Mich. 7 Jac. B. per Curiam.]

See pl. 5. and pl. 10.

Ibid. in marg. of the new edition (419) cites it as admitted 22 H. 6. 42. 27 H. 6. 34.—And in the new notes there (c) cites 22 H. 6. 44. and 11 E. 3. Common, 11. one claims common as appendant to his manor, and issue joined thereupon, where it is said, that if one has common appendant to his carve of land, whereon he has a house, this shall not be said appendant to his house, but to the land; and says, note there a special prescription.—It was ruled by Holt Ch. J. at Winchester Lent-assises, 10 W. 3. that a man may prescribe for common for cattle levant and couchant upon a messuage; and he said that he knew Hale Ch. J. to have been of the same opinion at Norfolk assises. Ld. Raym. Rep. 726. Hockley v. Lamb.—2 Brownl. 101. Mich. 9 Jac. C. B. Patrick v. Lowre, S. P. and it shall be intended that there is a curtilage to it.—Brownl. 198. Trin. 9 Jac. Patry v. Welch, S. P.

In trespass the defendant prescribed for common of pasture for all beasts levant and couchant upon a messuage. Exception was taken because of the word (messuage); but held good enough, and said to have been frequently adjudged so; for a messuage includes in it yards and curtilage, and the like. 2 Show. 248, pl. 250. Mich. 34 Car. 2. B. R. Scambler v. Johnson.—2 Jo. 227. S. C. The court held the prescription good; for this is not common appendant, but appurtenant, and such common is usual in the county of Lincoln, and other counties, and that it is maintainable better for beasts levant and couchant than otherwise.

As if at this day a man grants to one common of estovers, or of turbary in fee-simple to burn in his manor, by that grant it is appurtenant to the manor, and if he make a feoffment of the manor, the common shall pass to the feoffee. F. N. B. 181. (N).

And so if he grant to a man and his heirs common as appurtenant to his manor of F. to common in sub a moor, &c. now by that grant the grantee shall have the common appurtenant to his manor, and if he make a feoffment in fee or for life of the manor, the feoffee or lessee shall have the common. F. N. B. 181. (N).

See pl. 5. 10. A man cannot claim common appurtenant for hogs or goats, because they are not commonable beasts. D. 70. b. pl. 39. Trin. 16 E. 6. Withers v. Ifham.

Ow. 4. Wakefield's case, S. C. agreed accordingly. 11. Houses newly erected cannot have right of common where it is claimed by prescription. 2 Le. 44. pl. 58. Trin. 30 Eliz. C. B. Costard v. Wingfield.

—Godb. 96. pl. 110. S. C. adjudged.—And. 151. pl. 200. S. C. adjudged.—Goldb. 38. pl. 13. S. C. adjudged.—Sav. 81. Wakefield v. Costard, S. C.—But if the house of a freeholder, which hath used to have common for beasts levant and couchant, falls down, and he erects a new house in another place of the land, he shall have common to the new-erected house as he had before; and took a difference betwixt the case of estovers, where a new chimney is erected, and this case. Arg 2 Le. 44. in pl. 58. Trin. 30 Eliz. C. B.—Godb. 97. in pl. 110.

Ibid. says it was so held after several amendments in case of the corporation of Derby, between Miller v. Spateman.—See tit. Prescription (Y) pl. 3. S. C.

{ 593 } 13. It was ruled by Holt Ch. J. at Winchester Lent-assises, 10 W. 3. that a man cannot prescribe for common appurtenant to a farm, because it is uncertain of what a farm consists, perhaps of 10 acres, or of 100 acres; but the prescription ought to be laid to a messuage,

a messuage, and so many acres of land. *But if there is an ancient farm, and the same lands always occupied with it, a man may have common of pasture to depasture his cattle tilling that farm.* *Ld. Raym. Rep. 726. Hockley v. Lamb.*

(N) Common Appurtenant. The Ufer. How it shall be used. With what Cattle.

[1. **H**E that hath common appurtenant *cannot agist the cattle of a stranger.* 30 E. 3. 27.] S. P. nor can he agist with his own

cattle if they are levant and couchant upon some other land than that to which he hath common appurtenant. *Skin. 137, 138. pl. 8. Mich. 35 Car. 2. B. R. Molliton v. Trevillian.*

[2. He that hath common appurtenant may borrow sheep of another to compester his land, and with these he may use the common. 14 H. 6. 6. b. It seems it is intended common appurtenant, though it is called appendant.] Br. Common, pl. 14. cites S. C. and mentions appendant.

Fitch. Trespass, pl. 33. cites S. C.—S. P. of cattle borrowed to compester his land; for he has a special property in them, and so are said his cattle, *Arg.* and of this opinion was the court. *Skin. 138. pl. 8. Mich. 35 Car. 2. B. R.*

[3. A man may use common appurtenant to his manor with cattle which are for his household. 14 H. 6. 6. b. The book is of common appendant; but it seems to be intended by the book appurtenant.] Br. Common, pl. 14. cites S. C. & S. P. admitted.

[4. But he cannot use the common with cattle which are to sell. 14 H. 6. 6. b. as it seems the book is intended.] Br. Common, pl. 14. cites S. C.

(N. 2) Common Appurtenant Pleadings.

1. **T**Respass of grafs trampled in D. Chaunt. said *actio non*, for *T. was seised of the manor of D. in fee, and that he and all those whose estate he has in the manor, have had common in the place where, &c. with all manner of beasts appurtenant, and that the place extended to such place, &c. and after T. leased the manor with the appurtenances to the defendant for 10 years, &c. and after he borrowed sheep to compester his land, and put them in to use his common as he lawfully might; the plaintiff said that he had common there for all beasts except sheep and hogs, and no plea by award of court, by which he said that he had common there for all beasts except sheep and hogs *absque hoc, that he had common with all manner of beasts time out of mind, modo & forma prout, &c.* and note, that the reason why he pleaded that he borrowed beasts to compester the land, is because that termor cannot put any beasts in the common but those which he had to manure his land, or for his household, and not for sale. *Br. Common, pl. 14. cites 14 H. 6. 6.* [594]*

2. Assise of common, and the plaint is of common appurtenant to his franktenement in D. and shewed for title that he was seised of a messuage

messuage and of a carve of land in D. to which the common is appurtenant, and that he and his ancestors, and those whose estate, &c. had used common of pasture with 10 beasts, and well by these words (was seised) as well as if he had said (is seised); per Huffle. Br. Common, pl. 54. cites 16 H. 7. 12.

Brownl. 180.
Morse v.
Wells, S. C.
but S. P.
does not ap-
pear.—a
Brownl.
297. S. C.

3. When the prescription is for common appurtenant to land, *without alleging that it is for cattle levant and couchant*; there a *certain number of the cattle ought to be expressed*, which are intended by the law to be levant and couchant; resolved. 13 Rep. 65, 66. Hill. 7 Jac. C. B. Morse v. Webb.

See more of this at the divisions of Pleadings at the end of this title of **Common**.

(O) Common in Grofs. How it may begin.

If a man has a way to his manor or house by prescription, this cannot be made in grofs, because it is appendant to the manor or house; but common appurtenant, or a king's highway, or an advowson appendant, may be made in grofs; but common of estovers to burn in such a house cannot be made in grofs, nor common appendant which is by reason of the tenement, &c. Br. Common, pl. 28. cites 5 H. 7. 7. by Fairfax J. pro lege.—Pasturage claimed for sheep levant and couchant upon the defendant's land is common appendant, and cannot be severed from the soil by grant. Cro. C. 542, 543. pl. 7. Pasch. 15 Car. B. R. Arg. cites 4 H. 6. 13. & 8 E. 4.

Fol. 402.

Cro. J. 15.
pl. 19. Drury v. Kent,
S. C. adjudged that he could not grant it over, because he had it quasi sub modo, viz. for beasts levant, &c. but common appurtenant for beasts certain may be granted over.

[2. So common appurtenant for cattle levant and couchant upon the land, cannot be made in grofs for the aforefaid cause. Nevil, 384. 19 H. 6. 33. b. Pasch. 1 Jac. B. between DRURY AND RANT adjudged. Contra, 26 H. 8. 4.]

Cro. C.
432. pl. 2.
Spooner v.
Day, S. C.
adjudged in
C. B. and
affirmed in
error in
B. R.—
Jo. 375. pl.
1. S. C. the
court held
that this
being com-
mon appur-
tenant, may
be severed
from the
manor, es-
pecially
when it is
granted with
parcel of the

[3. If *A. and all those whose estate he hath in the manor of D. have had time out of mind a foldcourse, viz. common of pasture for any number of sheep not exceeding 300, in a certain field as appurtenant to the said manor, he may grant over his foldcourse to another, and so make it in grofs*, because the common is for a certain number, and by the prescription the sheep are not to be levant and couchant upon the manor; but it is a common for so many sheep appurtenant to the manor, which may be severed from the manor as well as an advowson, without any prejudice to the owner of the land where the common is to be taken. Mich. 11 Car. B. R. between DAY AND SPOONER, in a writ of error upon a judgment in B. R. per Curiam, præter Berkly, who seemed to doubt of this. Intratur Mich. 6 Car. Rot. 183. But there the case was, whether it might be granted over with parcel of the manor, and so should be appurtenant to this parcel, and so it is adjudged in Banco, that it should pass as appurtenant to this parcel, and so held per Curiam in B. R. præter Berkly, who doubted of this, but afterwards Hill.

11 Car. it was so adjudged by the consent of Berkly and all the court; and judgment affirmed accordingly.]

manor; and this common being for a certain number of sheep, viz. 300, the party may grant 250 to one, and reserve 50 to himself well enough, and affirmed the judgment in C. B.

4. If a man has a *way to his manor or house by prescription*, this cannot be made in gross, because it is appendant to the manor or house, but common appurtenant, king's highway, or advowson appendant may be made in gross, but common of estovers to be burnt in such house cannot be made in gross nor common appendant, which is by reason of the tenement. Br. Common, pl. 28. cites 5 H. 7. 7.

5. Common appurtenant and in gross may be by prescription, or may commence at this day by grant; per Wray Ch. J. 4 Rep. 38. a. b. Mich. 26 & 27 Eliz. B. R. in Tiringham's case.

(P) For *what Cattle*.

[1. A Man may prescribe to have it for all manner of cattle. 15 E. 4. 33.]

[2. The *grantee of common for a certain number of cattle cannot common with the cattle of a stranger*. 18 E. 4. 14. b.] F. N. B. 180. (B) S. P.

3. A man may prescribe to have common for all manner of beasts very well, by reason of his person, &c. per Pigot. Br. Prescription, pl. 28. cites 15 E. 4. 32.

4. A *general licence ad ponenda averia* shall be intended only of commonable cattle, and not of hogs; sed contra, if the licence had been *only for a particular time*; per North Ch. J. and it was admitted. 2 Mod. 7. Hill. 26 & 27 Car. 2. in C. B. in case of Smith & Feverel.

(Q) By the *Cattle of whom*.

[1. If a commoner hath no cattle, he cannot *agist the cattle of others to use the common*. * 45 E. 3. 25. b. Curia. † 22 Aff. 84.]

(K) cites S. C. — He that has common by specialty cannot agist the beasts of others. Br. Common, pl. 5. cites S. C.

† Br. Common, pl. 41. (40) cites S. C. — Fitzh. Affise, pl. 228. cites S. C.

[2. So he cannot command his *tenants at will* to use it with their cattle in his name. † 45 E. 3. 25. b. § 22 Aff. 84. same case.]

pl. 5. cites S. C. § Br. Common, pl. 41. (40) cites S. C. but the borrowing them in order to manure his land is not sufficient, unless he manures in fact with them. — Fitzh. Affise, pl. 228. cites S. C.

[3. But if he borrows other cattle to manure his land, he may use the common with them, for they are in a manner his cattle by the borrowing,

Br. Common, pl. 5. cites S. C.

— Br. borrowing, and the cattle, which manure the land; of right ought Seifin, pl. 5. to have common. || 45 E. 3. 25. b. ¶ 22 Aff. 84.]

¶ Br. Common, pl. 41. (40.) cites S. C. but the borrowing them in order to manure his land is not sufficient, unless he manures in fact with them. — Fitzh. Affise, pl. 228. cites S. C.

Br. Com- * [4. So he that hath common in grofs for a certain number of cattle mon, pl. 48. may put in the cattle of a stranger, and use the common with them. (47.) cites 11 H. 6. 22. b.] S. C. — Fitzh. Com- mon, pl. 3. cites S. C. — F. N. B. 180. (B) S. P.

Br. Com- [5. So he that hath common in grofs sans number, may put in mon, pl. 48. the cattle of another man, and use the common with them. 11 (47.) cites H. 6. 22. b.] S. C. — Fitzh. Com- mon, pl. 3. cites S. C. — F. N. B. 180. (B) S. P.

(R) Common in Grofs. What shall be said Com- mon in Grofs.

{ Fol. 403. [1.] F a man at all times hath used common with his cattle couchant and levant in certain places, and not with other cattle coming, this (*) is common appendant to this place, and not in grofs. 22 Aff. 36. Curia.] Br. Com- mon, pl. 23. cites S. C. & S. P. unless he and his ancestors claimed the common to be in grofs among the commoners, but if they had used it with such beasts so levant and couchant, and with other beasts coming, &c. then it shall be taken as in grofs. — Fitzh. Common, pl. 19. cites S. C. and by their claiming it as in grofs always among the commoners, their claim is known, which otherwise it would not have been, &c.

2. If one grants to J. S. 8 acres of land, simul cum so much common as belongs to his oxgange of land in a certain place, this is not common appurtenant, but in grofs; per Herle. F. N. B. 180, 181. (N) in the new notes there (c) cites 7 E. 3. 48.

3. But see there it is adjudged, if one grants an assart simul cum tota communia quant' pertinet ad unam bovatom terræ, this is common in grofs, and he shall take as much as another takes for 2 bovates or oxganges in grofs, and when he pleases, because such common cannot be appendant to land. F. N. B. 181. (N) in the new notes there (c).

4. If a man grants common to the mayor and burgeses for all their cattle in such a place, it is good, and in grofs, and not appurtenant; per Cur. 2 Lev. 246. Hill. 30 & 31 Car. 2. B. R. in case of Stables v. Mellon.

(S) Common in Grofs. What shall be a good Grant.

Br. Grants, [1.] F I grant common to another for years, and do not de- pl. 5. cites clare in what place he shall have it, this is void. 9 H. 6. 36.] 9 H. 6. S. P. by Paston, quod non negatur.

2. If

[2. If a man grants to another common, *ubicunque averia sua ierint*, this is a good grant, by averment in what place his cattle fed at the time of the grant; before or after. 9 H. 6. 36.]

Br. Grants, pl. 5. cites 9 H. 6. — Br. Common, pl. 3. S. P. Arg.

cites 9 H. 6. 36. but S. P. does not appear.—Fitzh. Common, pl. 2. cites S. C. — Roll. Rep. 427. in pl. 16.

* [3. But without such averment this is not good grant. 9 H. 6. 36.]

Br. Grants, pl. 5. cites S. C. & S. P. per Cur.

[4. If I grant common to another in my land every year, and it lies fresh, this is good, though it be at my will, whether he shall have any profit, for I may sow it. 17 E. 3. [34. b.]

[5. If A. grants common to B. in certain land, for all his cattle which shall be levant and couchant upon Black-acre, where B. hath nothing in Black-acre, so that it cannot be appurtenant, yet this shall not be a common in gross, because the intention and limitation of the grant is to cattle levant and couchant. Trin. 15 Jac. B. R. between GAWEN AND STACY, agreed at the bar.]

Roll. Rep. 424. pl. 16. Trin. 14 Jac. S. C. A man bargained and fold lands by deed indentured; and af-

terwards, but before inrolment of the deed, he granted to the bargaines and his heirs common for all commonable beasts manuring and feeding on the said land beforementioned, and afterwards the deed was inrolled. The point was, whether this inrolment shall relate so as to make the grant of the common good? It was argued, sed adjournatur. — Godb. 270. pl. 377. Mich. 15 Jac. Ludlow v. Stacey, S. C. adjudged a good grant of the common, and the inrolment shall have relation, though for collateral things it shall not have relation.

[6. [So] if A. grants to B. common in certain lands for all his cattle which shall manure and feed in Black-acre, whereas B. has nothing in Black-acre, by which this cannot take effect as a common appurtenant; yet this shall not take effect as a common in gross, inasmuch as it is expressly limited to such cattle which manure and feed in the said land.]

[7. [But] Trin. 15 Jac. B. R. between GAWEN AND STACY, the Court seemed e contra; but Mich. 15 Jac. they seemed to waive this opinion, and Croke held expressly e contra.]

See pl. 5. and the notes there.

[8. A man may grant to another common in one place for all manner of cattle, and in another place for 10 beasts; and so the grantee may put the 10 beasts in either of the two places. 17 E. 3. 34. b.]

9. If a man has common appurtenant to a messuage and lands for a certain number of beasts, he may alien the same; otherwise if he have common for all his beasts levant and couchant on such lands, he cannot alien this from the land; per Hale Ch. J. 2 Lev. 67. Mich. 24 Car. 2. B. R. in case of Daniel v. Hanflip.

(T) Common in Gross upon a Grant. In what Place it shall be taken.

[1.] F a man grants to me common for my cattle, *ubicunque averia sua ierint*, if the cattle of the grantor did never feed in any place before the grant, or at the time of the grant, or after, the grantee shall have no benefit by the grant. 9 H. 6. 36.]

Br. Common, pl. 3. cites S. C. but is only a reference to Br. Grants,

pl. 5. which cites 9 H. 6. that if after the grant the grantor has no beasts, the grantee shall not have common. — Perk. 109. S. P. only the (*ubicunque*) in the original in fol. 23. a. is wrong transcribed in the English edition (whensoever.)

Br. Grants,
pl. 5. cites
9 H. 6. S. P.
accordingly.
— Br.
Common,
pl. 3. cites
S. C. but it is only a reference to Br. Grants, pl. 5.

[2. *[But]* if a man grants common to another, ubicunque averia sua ierint, and after he occupies and manures 100 acres of land with his cattle, and after he becomes so poor that he hath no cattle, yet the grantee shall have the common in the 100 acres. 9 H. 6. 36. Curia.]

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[3. *[So]* if a man grants a common to me for my cattle ubicunque averia sua ierint, if the grantor at the time of the grant, or after, feeds his cattle in any place, the grantee may have common there also. 9 H. 6. 36.]

Br. Com-
mon, pl. 3.
cites S. C.
but for the
opinion re-
fers to Br.
Grants, pl. 5. which cites 9 H. 6. S. P. by Babbington accordingly.

[4. *[And]* upon such grant of common ubicunque averia of the grantor ierint; if the grantor puts his cattle in his garden, or in his corn, the grantee may put his cattle there also. 9 H. 6. 36.]

Fol. 404.

[5. *[But]* if the grant be of common ubicunque averia sua ierint, and the grantor dies; quere, whether the grantee shall have common after his death. 9 H. 6. 36.]

Br. Grants,
pl. 5. cites
9 H. 6. S. P.
by Babbington.
— But such

[6. If one man grants common to another for all his cattle throughout his manor, yet he cannot common in the garden of the grantor parcel of the manor, but only in such places where a man of common right ought to common. 9 H. 6. 36.]

grant is not any restraint to the wastes or commons, but the grantee may claim common, in any part of the manor, without pleading that it was waste or common. Agreed by Croke and Berkley, ceteris iusticiariis absentibus, and judgment accordingly. Cro. C. 599. pl. 20. Mich. 16 Car. B. R. Stringer's case.

7. Note, per Fitzherbert, there is a diversity between common for certain beasts, and pasture for his beasts; for if I grant to you pasture for certain beasts in my manor, I shall appoint you where you shall have it; but if I grant to you common for certain beasts in my manor, you shall * have it per my & per taut, and it was agreed that [præcipe] quod reddat lies of pasture for two oxen, but e contra clearly per Fitzh. of common for two beasts, because by him [præcipe] quod reddat never lies of common. Br. Common, pl. 2. cites 27 H. 8. 12.

* Orig. is
(pur ceo.)

8. If a man grants certain lands to one cum communia in omnibus terris suis, &c. and does not express any place certain, he shall have common in all his lands which he had at the time of the grant. F. N. B. 180. (G).

(U) Common in Gros by Grant. In what Time it is to be taken.

[1. **I**F a man grants common to me *quandocunque averia sua ierint*, the grantee shall not have common, but when the cattle of the grantor are in the common. 9 H. 6. 36. Curia.] Fitzh. Common, pl. 2. cites S. C. —

Perk. f. 109. S. P. and cites S. C. — So that if *afterwards the grantor has no beasts*, the grantee shall not have common; per Martin, quod fuit concessum. Br. Grants, pl. 5. cites 9 H. 6. — S. C. cited by Hobart Ch. J. that if the grantor employs the land to tillage, or lets it lie fresh, the grantee has no remedy, and says that so is the book of 17 E. 3. 26. Hob. 40. in pl. 47. — S. C. cited Cro. C. 599. in pl. 20. and Berkley J. said, that the clause of *quandocunque averia sua ierint* is void, because it restrains all the effect of the grant; for if the grantor will not put his cattle in, the grantee shall never have his common; but Crooke J. held the restraint good, because this is not a total restraint, & *modus & conventio vincunt legem*; and it is not intendible that the grantor would totally forbear to put in his cattle to defraud the grantee of his common. — 1 Rep. 87. a. cites S. C. that this is *modus donationis*, and the grantee shall not have common but in this manner.

2. Where a man grants common for 10 beasts a year in D. and he does not take common for two years, he shall not put in 30 beasts the 3d year, and so of eltovers, fuel, hay, &c. Br. Common, pl. 4. cites 27 H. 6. 10.

[599]
Br. Parnour de Profits, &c. pl. 2. cites S. C. — Fitzh. Common, pl. 6. cites S. C. — Br. Grants, pl. 8. cites S. C.

(X) Common. Seisin.

[1. **A**Tortious user of common cannot put him in seisin. 45 Ed. 3. 25. b. 26. 22 Aff. 84.]

[2. **A**s, the commoner cannot gain seisin by cattle which he agists, for such user is not lawful. * 45 E. 3. 25. b. † 22 Aff. 84. Curia.]

cites S. C. † Br. Common, pl. 41. (40.) cites S. C. — Fitzh. Affise, pl. 228. cites S. C.

[3. **S**o, he cannot gain seisin by the user of his tenants at will, being his servants, with their cattle by his command in his name; for their user with their cattle is tortious. ‡ 45 E. 3. 25. b. § 22 Aff. 84. same case.]

§ Br. Common, pl. 41. (40.) cites S. C. — Fitzh. Affise, pl. 228. cites S. C. — The user of common by tenants at will shall be a seisin to him in reversion to have an affise, if he or his tenant at will be after disturbed to use the common. F. N. B. 180. (1).

[4. **B**ut if the commoner hath no cattle, and so takes the cattle of another, and the tertenant delivers seisin to the commoner, and is present when the cattle are put in, and he assents to the user and putting in, or commands him so to do; this is a good seisin. || 45 E. 3. 26. 22 Aff. 84. per Thorpe.]

[5. **S**o if the commoner hath no cattle, he may take seisin by the cattle of another, and chase them back presently; for the continuance is tortious, and this is a good seisin. ¶ 45 E. 3. 26. per Thorpe; but Bro. Commoner, ¶ 51. [says] quære of this, and it

|| Br. Seisin, pl. 36. cites S. C. & S. P. by Thorpe,

¶ Br. Common, pl. 5. cites S. C. & S. P. by Thorpe, and Brooke

makes a
quare of it
——— Br.

Seisin, pl. 5. cites S. C.
cites S. C.

it seems not to be law; for the putting them in without continuance is tortious. ** 22 Aff. 84. per Thorpe.]

** Br. Seisin, pl. 36. cites S. C. — Fitzh. Affise, pl. 228.

[6. If a man hath common *sans number*, if he hath been *seised of this with cattle without any certain number*, as 20, 30, or 40; this is a good seisin. 11 H. 6. 23.]

Br. Seisin,
pl. 36. cites
S. C. Brooke
says quod
quare bene.
—— Fitzh.

[7. If a man *recovers a common*, and the *sheriff* upon a writ of seisin comes to the place, and *by parol delivers to him seisin* of the common; *this is a good seisin of common to have an affise.* 22 Aff. 84. per Thorpe.]

Affise, pl. 228. cites S. C. — Br. Affise, pl. 31. cites 45 E. 3. 25. S. P. that he shall have affise or redisseisin upon the first putting him in possession; because the law adjudges him in possession by the first seisin; quod non negatur. But Brooke says, tamen quare.

[600] (Y) In what Cases the *Seisin of one shall serve for others.*

* Br. Seisin, [1. **T**HE seisin of the father is not sufficient for the heir. * 45
pl. 5. cites Ed. 3. 25. † 22 Aff. 84.]
S. C.

† Br. Seisin, pl. 36. cites S. C. — Fitzh. Affise, pl. 228. cites S. C.

‡ Br. Seisin, [2. The seisin of a lessee for years of a common, is sufficient
pl. 36. cites for him in reversion. 45 E. 3. 26. † 22 Aff. 84.]
S. C. & S. P. by Seaton and Mowbray. — Fitzh. Affise, pl. 228. cites S. C.

This concludes Lord Roll's Abridgment, title Common, the additions whereto will be contained in a subsequent volume, it being supposed much more proper so to do, than to break the thread thereof by taking in any small part of it here.

THE END OF THE FOURTH VOLUME.



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